

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA *
V. * Case No: 2:16-cr-94-1
BRIAN FOLKS *

TRIAL BY JURY - DAY NINE - VOLUME I
MAY 7, 2019
BURLINGTON, VERMONT

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III
District Judge

APPEARANCES:

William Darrow, Esq. and Emily M. Savner, Esq. and Matthew
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1 TUESDAY, MAY 7, 2019 - 9:05 A.M.

2 [The following was held in open court with the jury present]

3 THE COURT: Good morning.

4 DEPUTY CLERK: This is Case Number 16-94 United
5 States of America versus Brian Folks. The Government is
6 present through Assistant United States Attorneys Emily Savner,
7 Matthew Grady, and William Darrow. The defendant is present in
8 the courtroom with his attorneys Natasha Sen and Mark Kaplan.
9 The matter before the Court is Trial by Jury day nine.

10 THE COURT: Okay. I think this is day 10, isn't it?

11 DEPUTY CLERK: No, Your Honor. It's day nine.

12 THE COURT: Oh I was wrong.

13 DEPUTY CLERK: With all due respect.

14 THE COURT: All right. Has anyone spoken to you
15 about the case? Have you learned anything about this case from
16 outside the courtroom or have you spoken among yourselves with
17 regard to this case? Okay. Everybody is saying no. I
18 appreciate that. I think we are ready to continue and, Mr.
19 Grady, do you have your witness?

20 MR. GRADY: Yes, Your Honor, we do. Professor Epp,
21 would you go ahead and retake the stand?

22 THE COURT: Actually would you approach for the oath
23 again?

24 MS. EPP: Yes, Your Honor.
25 Marilyn Epp,

Marilyn Epp

4

1 Having been duly sworn, testified as follows:

2 THE COURT: Good morning.

3 MS. EPP: Good morning, Your Honor.

4 THE COURT: Do you think of yourself as agent or
5 professor?

6 MS. EPP: I'm just Marilyn.

7 THE COURT: Oh I see. Okay.

8 CONTINUED DIRECT EXAMINATION

9 BY MR. GRADY:

10 Q. Ms. Epp, when we last left we were talking about
11 Government exhibit 128 which I believe you describe as a video
12 of the defendant talking about urinating on women?

13 A. Yes.

14 MR. GRADY: Your Honor, the Government moves to admit
15 and publish 128.

16 THE COURT: It is admitted.

17 [Government exhibit 128 admitted and published]

18 MR. GRADY: Thank you, Your Honor. No further
19 questions.

20 THE COURT: All right. Cross examination, Ms. Sen.

21 MS. SEN: Yes, Your Honor.

22 CROSS EXAMINATION

23 BY MS. SEN:

24 Q. Miss Epp, as a DEA intelligence analyst you had an
25 civilian position with the DEA; is that correct?

Marilyn Epp

5

1 A. Yes.

2 Q. And you received training on intelligence issues for 12
3 weeks at the DEA Academy?

4 A. I did.

5 Q. And that was not law enforcement training; is that
6 correct?

7 A. It is through the DEA Academy so there's law enforcement
8 training involved.

9 Q. But isn't the actual -- if you're an actual agent you
10 would go for like a six-month course at Quantico, Virginia?

11 A. 18 weeks, but it's longer, yes.

12 Q. So you didn't do that one, right?

13 A. No.

14 Q. So you're an analyst?

15 A. Uh-huh.

16 Q. Civilian analyst, and you worked as an civilian
17 intelligence analyst with the resident office here in
18 Burlington, Vermont; is that correct?

19 A. I did.

20 Q. So you also said that you received training on using
21 social media web sites; is that correct?

22 A. Yes.

23 Q. And, for example, you would learn how to use web sites
24 or platforms like Facebook, Instagram, Twitter?

25 A. Yes.

Marilyn Epp

6

1 Q. And you would create fake profiles for those and go
2 undercover?

3 A. Yes.

4 Q. When did that training actually take place?

5 A. I had a couple different trainings in social media
6 exploitation. It was discussed at the academy. The last stand
7 alone training I had I think was in the summer of 2017.

8 Q. And wouldn't that be after most of the work on your case
9 -- on this case?

10 A. That training took place while I was doing this. In
11 fact the last training took place during this investigation.

12 Q. And in fact we know that Mr. Folks was actually arrested
13 a year earlier in July 2016, correct?

14 A. Yes.

15 Q. So just to talk a little bit about these web platforms,
16 taking Facebook as an example, this is an internet platform
17 that allows users to post information about themselves; is that
18 right?

19 A. Yes.

20 Q. And it allows people who have accounts to comment on
21 things that are posted, isn't that correct?

22 A. It is.

23 Q. And so there's a public area where whatever is posted is
24 visible to anyone --

25 A. Yes.

Marilyn Epp

7

1 Q. -- is that correct? And there's also a private side to
2 Facebook where people can exchange messages privately?

3 A. Correct.

4 Q. And in that private area it's only people who are
5 designated by the account owner who can exchange messages?

6 A. Some profiles are set up so they can be messaged by
7 another user who is not their friend. So it depends on how you
8 set up your profile.

9 Q. But it's fair to say then for sending messages through
10 Facebook that the account owner has to give permission? They
11 have -- sorry. Let me go back a second. When you have a
12 Facebook account you control the settings for who contacts you
13 and how they contact you?

14 A. Yes.

15 Q. So it's the account owner who determines who is able to
16 send them messages; is that right?

17 A. Yes.

18 Q. So you talked about, and we've discussed, that you
19 created fake profiles in order to do your undercover
20 investigations?

21 A. In order to, yes, aid the investigations.

22 Q. And so was that -- did that allow you to access the
23 private areas of people's Facebook accounts?

24 A. No.

25 Q. So you were only looking at public areas?

Marilyn Epp

8

1 A. Yes unless that person friended me -- friended that
2 profile.

3 Q. In which case you could actually look at private
4 information on the account?

5 A. I could look at whatever someone's friend list could
6 look at.

7 Q. And some of that would not be available to other people
8 in the public, isn't that correct?

9 A. Correct.

10 Q. So when you create a Facebook or -- I'm using Facebook
11 as an example.

12 A. Sure.

13 Q. But any other sort of social media account are you
14 required to use your real name and address in order to create
15 the account?

16 A. No.

17 Q. And so do operators of media web sites like Facebook
18 require other kinds of methods of identification in order to
19 open an account?

20 A. They do.

21 Q. So what kinds of methods do they use to verify who
22 people are?

23 A. E-mail.

24 Q. But the e-mail account could be fake, right?

25 A. Correct.

Marilyn Epp

9

1 Q. And without going into too much confidential detail
2 that's part of what you did, right, creating a fake profile?

3 A. Yes.

4 Q. And I'm going to assume that the fake accounts that you
5 created did not contain any personal identifying information of
6 yourself?

7 A. No.

8 Q. So it's pretty easy to create a social media account
9 using someone else's name and an alias?

10 A. You can do it, yes.

11 Q. You can actually post pictures that are completely
12 unrelated to you on your Facebook page, isn't that correct?

13 A. People can do that, yes.

14 Q. And do your social media web sites like Facebook create
15 -- have security mechanisms that ensure that only the
16 legitimate account holder can log in?

17 A. They do have mechanisms. It doesn't always work.
18 Depends on if there's certain flags that appear or people
19 report suspicious activity.

20 Q. But it's possible that a person who has the user name
21 and password for an account can access the account?

22 A. Yes.

23 Q. Without the legitimate account holder's knowledge?

24 A. There's often two step verification where they will send
25 an e-mail or a code to an e-mail to verify or if you have a

Marilyn Epp

10

1 phone number associated with the account. So if you have -- if
2 you're using a device to access an account and that device
3 hasn't been used to access that account before, quite often
4 there will be a two step verification where they are going to
5 send a code to an e-mail or phone and ask that that code be
6 input before you can gain access. It's becoming more and more
7 common.

8 Q. And it's the account user who sets up whether two step
9 verification occurs, isn't that right?

10 A. Sometimes the web sites just require it. It depends on
11 which platform.

12 Q. And social media platforms. So, for example, I'm using
13 Facebook, Instagram, the defunct Backpage, they have certain
14 standards for what can be publicly posted, isn't that correct?

15 A. I don't know that Backpage would be considered a social
16 media platform.

17 Q. It was a web site, right?

18 A. Right, but it wasn't considered social media. It was
19 more like a Craigslist. Like a buying and selling more than a
20 social media.

21 Q. Fair enough.

22 A. Yes.

23 Q. But they would have certain community standards and
24 guidelines for what could be posted on the public areas where
25 people could view and access them, isn't that fair?

Marilyn Epp

11

1 A. Yes.

2 Q. And, for example, Facebook wouldn't prevent nudity --
3 pictures of nude women or men to be posted, isn't that correct?

4 A. Nude pictures do get posted, but they can be flagged
5 either by -- on the administrative side or if another user were
6 to flag it and make the administrative side aware of it, but
7 nude pictures can be posted, but they usually get taken down.

8 Q. Right because they have community guidelines that
9 actually --

10 A. Right.

11 Q. -- require -- say that if you post a nude photo we'll
12 take it down, right?

13 A. Yes.

14 Q. So if there are a lot of nude pictures of nude women or
15 men in Facebook typically those photos would be showing up in
16 private messages, isn't that correct?

17 A. Private messages or private photo albums.

18 Q. And those are not available publicly obviously, right?

19 A. Those aren't available publicly and you can also make
20 them not available to anyone. It can just be a stand alone
21 album for yourself within your profile.

22 Q. So you testified for quite a long time yesterday about
23 the photographs and the videos that you reviewed from the
24 computer that was seized at 96 Ethan Allen Parkway?

25 A. Yes.

Marilyn Epp

12

1 Q. Do you remember that?

2 A. Yes.

3 Q. And you were aware that Agent Chetwynd had transferred
4 that computer -- or, I'm sorry, that, yes, Agent Chetwynd had
5 transferred that computer on July 21st to Agent Destito at the
6 FBI?

7 A. Yes.

8 Q. And you were aware that one of the reasons that that
9 computer was transferred to FBI is because the FBI intended to
10 send it to its digital forensic lab for analysis?

11 A. That was the hope.

12 Q. And that's why Agent Destito placed the computer in the
13 evidence vault, right?

14 A. Yes.

15 Q. And one of the reasons you place evidence in a vault is
16 to ensure its integrity, is that fair to say?

17 A. Maintain chain of custody, yes.

18 Q. Because you want to make sure that evidence that comes
19 into court isn't tampered with, right?

20 A. Yes and to ensure the chain of custody is intact.

21 Q. Right, and in fact you document the chain of custody
22 very closely, don't you?

23 A. We do.

24 Q. Because otherwise you don't know whose accessed a piece
25 of evidence, where it's been, isn't that correct?

Marilyn Epp

13

1 A. Correct.

2 Q. And in fact in this case when there are drugs seized
3 agents have come on and testified about how those drugs were
4 passed from one to the other until it got to the lab and was
5 tested, isn't that fair to say?

6 A. Correct. I wasn't in the courtroom, but that's common
7 practice.

8 Q. You were aware that occurred -- sorry. You were aware
9 that that occurred in this case though, right?

10 A. When we were investigating and seizing drugs, yes.

11 Q. And one of the reasons that you want to ensure the chain
12 of custody is because once evidence is tainted there's some
13 question about its integrity, isn't there?

14 A. I don't know what you mean by taint.

15 Q. If someone touches -- well let me give you an example.
16 You seize a firearm when someone's arrested and you carefully
17 -- the firearm goes from the seizure to the vault at the police
18 department and then the police department is supposed to send
19 that firearm to a technician who is going to test it for
20 fingerprints. Okay.

21 A. Okay.

22 Q. I'm just giving you a hypothetical.

23 A. Right.

24 Q. If someone were to touch that gun in the middle and then
25 send it to the lab, wouldn't that be kind of a problem?

Marilyn Epp

14

1 A. The gun is going to be touched to transfer it.

2 Q. But aren't there ways to handle it? You would use
3 gloves, for example?

4 A. Uh-huh.

5 Q. You would be careful to document you are actually
6 handling a firearm?

7 A. I don't know. I don't know what firearm chain of
8 custody entails.

9 Q. Wasn't -- well let me ask you the same question about
10 drugs. Would the same process occur?

11 A. Somebody is going to open up a packet of drugs and take
12 a portion out of it and conduct a field test. So they are
13 breaking into the packaging and they are taking out a portion
14 of it and they are going to field test it to see whether or not
15 it proves positive for the substance that you believe it to be
16 and then you repackage it up and then you send it to the lab.

17 Q. And you seal it, isn't that correct?

18 A. Yes. Repackage it.

19 Q. As was done in this case, and then you sign it to
20 indicate that it was sealed and this is what happened on that
21 date, correct?

22 A. Yes.

23 Q. And the reason you do that is because you want to make
24 sure that no one has affected the integrity of what was seized,
25 isn't that correct?

Marilyn Epp

15

1 A. Correct.

2 Q. And one of the very common ways that you ensure that
3 there's a chain of custody for a device is that you document
4 it, right?

5 A. The chain of custody with receipts, yes.

6 Q. Exactly. So every person who touches that piece of
7 evidence creates a document saying -- or there's some record,
8 whether it's on the item itself or in a separate report,
9 talking about how that item went from one person to the other
10 until it got to its final destination, right?

11 A. Yes. It's usually by entity. Like when the FBI gave it
12 to us Adam probably -- Agent Chetwynd came in the room, we
13 talked about the computer, he didn't sign off on the receipt.
14 I had already signed the receipt for DEA. So it's entity to
15 entity, yes.

16 Q. Okay. Fair enough. So the warrant to search this
17 computer was issued on January 27, 2017?

18 A. Yes.

19 Q. And three days later on January 30th Agent Destito
20 transferred that computer to you?

21 A. Yes.

22 Q. I'm going to ask you to look at what I have been -- what
23 has been marked as defendant's ZZ7 which is the search warrant
24 return for the computer. Now if you look at the first page
25 this is the actual search warrant, right?

Marilyn Epp

16

1 A. Yes.

2 Q. And it says that an authorized law enforcement officer
3 is authorized to search the computer, right?

4 A. And four other devices.

5 Q. Right and four other devices including the computer?

6 A. Uh-huh.

7 Q. Were you an authorized law enforcement officer at the
8 time that you conducted the search of this computer?

9 A. Yes. I'm allowed to be a part of executing search
10 warrants, yes.

11 Q. So were you deputized in order to do that?

12 A. No, but it was part of my job.

13 Q. So on the second page it looks like it appears from your
14 signature that you filled this out?

15 A. I did.

16 Q. And do you see the top line there?

17 A. Yes.

18 Q. It says the date and time the warrant was executed was
19 on January 27, 2017 at 2:30?

20 A. Correct.

21 Q. And it says the copy of the warrant and inventory was
22 left with Frank Thornton?

23 A. Yup.

24 Q. So I'm just confused. Agent Destito says that you
25 transferred this computer -- that he transferred the computer

Marilyn Epp

17

1 to you on January 27th?

2 A. No. On January 30th.

3 Q. 30th, sorry, and your return says that you executed the
4 warrant on January 27th and that you left a copy of the warrant
5 and inventory with Frank Thornton?

6 A. Yes.

7 Q. Can you explain that?

8 A. Yes. On January 27th after the warrant was signed --
9 because it was signed that morning. We had some of the devices
10 with us, three of the phones, and so I started executing this
11 warrant with the phones on January 27th at 1430 hours. So I
12 had to put down when I started because there was five different
13 devices. So I had started executing the warrant at that time
14 and then I -- as you know on February 3rd I took all of the
15 inventory and a copy of the warrant and left it with Frank
16 Thornton when I realized that we didn't have the capabilities
17 at DEA to access the computer in a way that it needed to be.

18 Q. Well yesterday on direct you testified that you hadn't
19 even heard of Frank Thornton until after you turned on the
20 computer and tried to search it on February 2nd; is that
21 correct?

22 A. Correct. This was filled out on April 24, 2017.

23 Q. So you're saying that you're mistaken about providing
24 those devices to Frank Thornton on January 27th?

25 A. At the time that I filled this out I was saying that I

Marilyn Epp

18

1 had taken the evidence and a copy of the warrant and taken it
2 to and left it with Frank Thornton and he still had -- he still
3 had all those items at that time.

4 Q. But these reports don't indicate that he received those
5 items on January 27th?

6 A. He didn't, but at the time that I filled this out he had
7 them. So I was saying that I began executing the warrant on
8 January 27th in the afternoon and at the time I filled this out
9 all of those items and a copy of the warrant were with Frank
10 Thornton.

11 Q. It's not exactly clear from the face of this that that
12 is what occurred, is it?

13 A. I guess not, no. I just filled out the form.

14 THE COURT: When did you fill out that form?

15 MS. EPP: April 24, 2017. At that point we had
16 gotten back the forensic -- most of the forensic extraction
17 from Frank so I was able to fill out what was the inventory
18 that was seized.

19 BY MS. SEN:

20 Q. So just going back to you receiving this computer, Agent
21 Destito transferred the computer to you on January 30th?

22 A. Yes.

23 Q. And that computer sat with you until February 3rd --
24 February 2nd; is that correct?

25 A. It did.

Marilyn Epp

19

1 Q. And on -- and who made the decision not to send that
2 computer to the FBI to conduct a digital forensic investigation
3 of it?

4 A. Destito -- sorry. Agent Destito had asked the FBI lab
5 and they said the turnaround was at least six months for any
6 sort of work to be done on computers. So we knew that wasn't a
7 reasonable option.

8 Q. So then when you learned that you decided that you were
9 going to try to search the computer?

10 A. I did.

11 Q. And you have no digital forensics training whatsoever,
12 isn't that correct?

13 A. Not for computers.

14 Q. Well isn't searching a computer a little different than
15 searching a phone?

16 A. I know that now, yes.

17 Q. Well before that time you had never attempted to search
18 a computer, had you?

19 A. I had not attempted to search a computer. I had the
20 forensic extractions given to me before, but I had never had a
21 computer tower that needed to be searched.

22 Q. And even as you sit here today you have no idea how you
23 would extract a forensic image or create a mirror image of a
24 hard drive, do you?

25 A. No idea.

Marilyn Epp

20

1 Q. You wouldn't know how to examine the contents of a hard
2 drive?

3 A. Not without the report given to me, no. I don't know
4 how to create a mirror image.

5 Q. And, in fact, you testified yesterday that when you
6 started searching the computer that it didn't even occur to you
7 that searching a computer was a specialized skill that you
8 needed specialized training for, isn't that correct?

9 A. Creating a sort of mirror image I didn't know that that
10 -- yeah I didn't know there was a specialized -- I didn't -- I
11 was ignorant of the available resources for doing such a thing,
12 yes.

13 Q. So you received DEA training and you said you received
14 law enforcement training, right?

15 A. I don't know what you mean by law enforcement training.
16 We had to learn laws and how they apply to our jobs.

17 Q. Maybe I can ask you a better question. You received
18 training on how to handle evidence, right?

19 A. Yes.

20 Q. Okay. How to seize it? How to preserve it?

21 A. Yes.

22 Q. Maintain its integrity, isn't that correct?

23 A. Yes.

24 Q. And you weren't aware -- and so this all took place in
25 early 2017. Fair enough?

Marilyn Epp

21

1 A. This?

2 Q. Yes. Search of this computer?

3 A. Yes.

4 Q. For at least the last decade the Department of Justice
5 has had guidelines, very specific guidelines, on how to handle
6 digital forensic evidence and you're saying that you weren't
7 aware of any of that? In all of your training you weren't
8 aware?

9 A. I did not know there was specific DOJ guidelines before
10 this last Sunday.

11 Q. Before Sunday?

12 A. Before this -- what was that day? The 5th.

13 Q. How did you learn that?

14 A. Understanding that I went into the computer that it was
15 an issue. I didn't know before that.

16 Q. Who did you learn that from?

17 A. Talking with the prosecutor.

18 Q. What else did you talk about?

19 A. What I talked about yesterday.

20 Q. What did you talk about with respect to your handling of
21 the computer before it was turned over to Frank Thornton?

22 A. That there were DOJ guidelines and I was asked if I knew
23 that and I said no.

24 Q. And I don't remember if you testified about this or not
25 yesterday, but you didn't write a report about your attempts to

Marilyn Epp

22

1 search the computer, right?

2 A. I did not.

3 Q. Even if you didn't obtain any evidence from the computer
4 as you maintain, wouldn't it have been important for you to
5 document the chain of that computer?

6 A. The chain of custody was documented for that computer.

7 Q. Not clearly.

8 A. There's a receipt from us -- from DEA to Agent Destito,
9 FBI, and there's a receipt with Destito giving it back to me at
10 DEA.

11 Q. Wouldn't it have been important before last Sunday to
12 have some information about what happened to that computer
13 while it was in -- while it was in your custody? It wasn't in
14 a evidence vault, for example, was it?

15 A. It was in a locked office within a locked facility.

16 Q. And it was turned on?

17 A. I did turn it on, yes.

18 Q. And you weren't supposed to turn it on?

19 A. I was executing a search warrant. I -- there was -- I
20 turned on evidence that is electronic to search it. That's
21 what I was doing.

22 Q. So you didn't write a report about this turning on the
23 computer?

24 A. No because I didn't gain any evidence from turning on
25 the computer.

Marilyn Epp

23

1 Q. Right, and you handled -- you handled evidence, but you
2 didn't document that you did so, isn't that correct?

3 A. It's documented by me signing for the computer.

4 Q. You didn't document that you turned it on though?

5 A. No.

6 Q. No, and in fact you told the case agents that you turned
7 the computer on, didn't you?

8 A. Yes.

9 Q. And they didn't document that you powered on the
10 computer?

11 A. No because no evidence was gained from me powering on
12 the computer.

13 Q. And then you told Frank Thornton that you powered on the
14 computer?

15 A. Yes.

16 Q. And he did not identify -- he didn't even identify that
17 the computer had been turned on if he was aware of it?

18 A. I don't know. Okay.

19 Q. And he didn't put it in his report either?

20 A. Okay.

21 Q. You reviewed his reports because he gave you all of
22 everything that he found, right?

23 A. I did.

24 Q. Okay, and you even told Abigail Averbach, the former
25 AUSA on this case, the prosecutor, that you turned on the

Marilyn Epp

24

1 computer?

2 A. I did.

3 Q. And not one of the those people on the prosecution team
4 ever disclosed that that computer was turned on? If it were
5 standard operating procedure for someone like you to turn on a
6 computer to search it, why not document it?

7 A. I didn't document every time that I turned on a phone to
8 search it unless there was evidentiary value found within that
9 phone. So I don't think it occurred to anyone to document not
10 gathering evidence.

11 Q. You have written lots of reports where you talked to
12 witnesses where you don't gain evidence that you eventually
13 use, isn't that correct?

14 A. If there's information that is pertinent at the time of
15 that interview, I document it. It may not end up at trial, but
16 it is considered relevant to the case as evidence.

17 Q. And no one on the prosecution team in this case decided
18 that turning on a computer was a big deal, right?

19 A. I don't -- I can't speak for everyone on the prosecution
20 team. I know I didn't understand that there was any detriment
21 to powering on the computer.

22 Q. And no one disclosed it because no one realized it that
23 the defense team would actually discover that you turned it on?

24 A. I can't say what was on the minds of the prosecution
25 team.

Marilyn Epp

25

1 Q. You were part of the prosecution team, weren't you?

2 A. I don't know whether or not anyone knew that it was
3 important.

4 Q. Well isn't that part of your job?

5 A. Isn't what part of my job?

6 Q. Figuring out what's important in a case and bringing
7 that to agents' and prosecutors' attention?

8 A. Absolutely and when I didn't find any evidence in the
9 computer when I turned it on and I realized that our
10 capabilities at DEA were going to be limited I passed it on to
11 somebody who had the ability to gain access to the computer.

12 Q. So Frank Thornton extracted information from the hard
13 drive when you passed it on to him, isn't that correct?

14 A. Yes.

15 Q. And you reviewed the information that he extracted?

16 A. Yes.

17 Q. Which is primarily photographs and videos?

18 A. Yes primarily.

19 Q. So can you explain what metadata is as it relates to a
20 digital picture?

21 A. I'm not a computer -- as we've established pretty well
22 at this point I'm not a computer digital forensic expert. I
23 understand it to be data that's embedded into a file that
24 provides information about that file.

25 Q. Can you explain what MAC times are as they relate to

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1 files that are found on a computer?

2 A. I believe that stands for modified access or created and
3 they are date stamps associated with one of those headings.

4 Q. And have you learned all this information because Frank
5 Thornton told it to you?

6 A. I've learned some of this information over the years
7 because you deal with similar data when you pull images off of
8 a phone or other electronic storage devices.

9 Q. And so you understand that metadata and MAC times are
10 two totally different things?

11 A. Yes.

12 Q. Do major social media web sites scrub metadata from
13 images that are uploaded to their sites?

14 A. Most of them do.

15 Q. So if a digital picture is present on a computer or a
16 cell phone and that image doesn't contain any metadata, are
17 there any inferences that you can make as an investigator about
18 the source of that image?

19 A. If there's no meta or MAC data associated with the photo
20 -- repeat the question.

21 Q. Can you tell how the computer -- how -- can you draw any
22 inferences from where that picture came from if you don't have
23 any metadata or MAC data?

24 A. You can look at what is in the photograph.

25 Q. But you don't have any data behind the photograph to

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1 talk about when it was taken, when it came on to the device
2 that you're looking at, or anything else, isn't that correct?

3 A. Regarding the information that would normally be
4 embedded to the file, no. Obviously if it's been stripped off
5 you won't have any of that, but you would be able to use
6 context included in the picture. It's totally subjective. It
7 would depend on what the image is.

8 Q. Would a digital image taken with a cell phone and then
9 saved to a computer still contain the same metadata?

10 A. I don't know.

11 Q. So would a digital picture downloaded by a user from
12 Facebook have any metadata?

13 A. You're asking if somebody pulled a photo from someone
14 else's Facebook profile would there be any metadata associated
15 with that photo? I don't know if metadata would be created in
16 the copying of that photo from the online application on to a
17 device. I'm not sure how that would change the information
18 that is in the photo.

19 Q. Basically you don't have the skills or experience to
20 answer that, do you?

21 A. I'm not sure what you're asking.

22 Q. I'm asking you whether a digital picture --

23 A. Would there be information embedded into a photograph
24 that you pull off of online? There will be some sort of
25 information.

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1 Q. Even if Facebook scrubs it?

2 A. I don't know. I don't know if what is embedded into a
3 photograph when you pull it off of the internet. That would be
4 probably a case-by-case basis I would imagine.

5 Q. You don't have the training or experience to be able to
6 analyze how a photograph arrived on a device, do you?

7 A. I know basic ways to look at data attached to a
8 photograph.

9 Q. You can't determine whether a photo was downloaded from
10 the internet, can you? Doesn't that take specialized forensic
11 training to figure that out?

12 A. To get information that's embedded from a -- on a photo
13 to determine whether or not it was downloaded from the
14 internet? Probably.

15 Q. Well wouldn't that information be on the computer?

16 A. I imagine this is a case-by-case basis. It would depend
17 on the device that took it, where you got it off of the
18 internet. There's a number of -- there's so many factors in
19 this question that it's hard to answer.

20 Q. Fair enough, and you can't tell from looking at a
21 photograph or a video who actually took it, can you? You need
22 additional information, don't you?

23 A. Unless you can hear the person's voice who is filming or
24 see them in the video.

25 Q. Okay. Based on the extractions of the computer that Mr.

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1 Thornton provided you, you identified photographs of women from
2 the hard drive. Isn't that fair to say?

3 A. Yes.

4 Q. You didn't identify how many of those photographs were,
5 for example, selfie photographs which would be fairly obvious
6 from the photograph?

7 A. I didn't do a numerical count, no.

8 Q. And you didn't identify in all cases what devices those
9 photographs were taken with?

10 A. No. There's so many photos, no.

11 Q. And you didn't do an analysis as to how those photos
12 actually arrived on the computer, right?

13 A. No. That wasn't part of the investigation.

14 Q. Wouldn't it be significant to know whether a photo is
15 downloaded later on from a web site or whether it's uploaded
16 from a device like a camera?

17 A. If it's pertinent to what you're investigating.

18 Q. Well wouldn't it be pertinent to knowing whether
19 somebody posted something on Backpage whether an image was
20 uploaded or whether it was downloaded after the ad was posted?

21 A. Clarify the question. Give me an example perhaps.

22 Q. Well wouldn't it be important to know, for example, if
23 someone is uploading a photo to Backpage versus --

24 A. I don't know that you would find that information
25 embedded in a photograph on the hard drive.

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1 Q. You would find it on the hard drive, though, wouldn't
2 you?

3 A. You would find the photo. I don't know it attaches --
4 data attaches to a photograph to say whether or not it was
5 uploaded.

6 Q. There would be data on the computer if something was
7 uploaded, wouldn't it, or is that just beyond your skill set
8 right now?

9 A. I looked at the photo files themselves and I didn't see
10 any. In my purview of the photos I did not locate any
11 information that had to do with whether or not it was uploaded
12 or downloaded.

13 Q. But that would be a significant issue to look at,
14 wouldn't it?

15 A. It depends on the parameters of what you're looking for.
16 When I find a photo in a Backpage ad and then with a date stamp
17 on that Backpage ad and then I find a photo in the hard drive
18 and it's the same photo and there's date information associated
19 that lines up with that timeline you have two independent
20 sources of information. That's the basis of intelligence work.
21 You never rely on a single source of information. You
22 corroborate.

23 Q. But if you don't know when the photograph from the
24 Backpage ad arrived on the computer, isn't that kind of a
25 missing piece of information?

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1 A. It would depend if there is a date associated with the
2 image on the hard drive and it corroborates the date it's
3 posted online on Backpage, you're drawing -- that's
4 investigating right there. You're drawing connections.

5 Q. But if the date of the Backpage ad is let's say January
6 1 and the date that the picture is downloaded on the computer
7 is February 15, that's a little different, isn't it?

8 A. If it's -- it depends on which date are you talking
9 about. Are you talking about taken? Accessed? Created? I
10 mean those dates can change.

11 Q. We'll go through some of these.

12 A. Those dates can change when you transfer a photo from
13 one device to another.

14 Q. So the photo is now in the computer. You didn't take
15 the picture with the computer. It got there somehow. Right?

16 A. Right.

17 Q. We're going to go through that. How do you determine
18 who created a Backpage ad?

19 A. Well you can't say for certain. You can just say what
20 phone number and what e-mail addresses are associated with the
21 Backpage ad --

22 Q. And let me show you something.

23 A. -- unless somebody has a permanent user profile on or
24 had on Backpage.

25 Q. Sorry. Can I ask you to turn on the Elmo please? So

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1 this is exhibit 50B that was admitted yesterday that you talked
2 about. Does that look familiar?

3 A. Yes.

4 Q. So that's the first page of it and I'm going to turn to
5 the last page, and you see here there is an email address for
6 the Backpage ad which we're talking about?

7 A. Uh-huh.

8 Q. There's also an IP address for that ad, isn't that
9 correct?

10 A. There is.

11 Q. So what does that indicate to you?

12 A. An IP address is going to be an address associated with
13 the device that was used to create the ad.

14 Q. So if you wanted to figure out who actually posted the
15 ad, wouldn't you figure out who owned that IP address?

16 A. That's not how IP addresses work necessarily especially
17 if you're on a shared network or if you're using cellular data
18 on a cellular device. It's not going to come back to a
19 specific user.

20 Q. Well sometimes in a lot of cases don't you send a
21 subpoena to collect information from the IP address? For
22 example, from Verizon, they will send you subscriber
23 information to the IP address and that way you connect up who
24 it's connected to, isn't that correct?

25 A. You can.

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1 Q. You didn't do that in this case though, did you?

2 A. Did not.

3 Q. So I'm going to show you what was admitted yesterday as
4 Government's 51B which are photos of Katelynn and I'm going to
5 draw your attention to the bottom portion here. Were those
6 columns created by you or were they created by Mr. Thornton?

7 A. Well I snipped those myself and Matt Benoit snipped
8 those from a computer. We didn't create them. That's just
9 data that's on the computer.

10 Q. What's the date acquired mean?

11 A. Again I'm not a specialist, but it's my understanding
12 that it designates when a photo is transferred from one device
13 to another --

14 Q. Okay.

15 A. -- or uploaded.

16 Q. Do you know whether that's the same date as when the
17 picture is created on the computer?

18 A. I don't know. I know it can change if you copy it from
19 one place to another.

20 Q. I'm going to show you the same picture at the bottom
21 here. So I'm looking at this photo SMH 012 and here it says
22 that the photo was taken -- if you go down to this line that
23 talks about the data for that phone -- it was taken on
24 September 17, 2013?

25 A. That's what the data says.

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1 Q. Do you know when that picture was saved to the hard
2 drive?

3 A. I don't.

4 Q. You can't explain how these pictures arrived on the
5 computer, can you?

6 A. No.

7 Q. You don't know whether they were downloaded from a web
8 site?

9 A. I don't know. No.

10 Q. I'm going to ask you some similar questions for photos
11 in exhibit 50D that you talked about yesterday. So this is the
12 Backpage ad I had shown you earlier. So it looks like this
13 Backpage ad was posted on January 2nd of 2016?

14 A. Yes.

15 Q. And you testified that these photos were found on the
16 hard drive?

17 A. Yes.

18 Q. And exhibit 50B, that was the photo My Cars 3508?

19 A. Bears a great resemblance to it, yes.

20 Q. Do you know when that photo was saved to the hard drive?

21 A. I don't know when it was saved to the hard drive. No.

22 Q. And you don't know how that photo arrived on the hard
23 drive in this case, do you?

24 A. I do not know how it was transferred there.

25 Q. I'm going to show you another page from 50B that has

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1 photos. Can you look at these two photos IMG 3027 and KK 137?

2 A. Yes.

3 Q. They look identical, don't they?

4 A. There's some shading differences like there's a filter
5 on one not the other, but they are clearly basically the same
6 image. One has been altered.

7 Q. So what's the date taken of the 3027 photo?

8 A. July 11, 2013.

9 Q. And what's the date taken of the KK 137 photo?

10 A. September 17, 2013.

11 Q. How do two identical pictures have different dates
12 taken?

13 A. I've asked that question before because I've come across
14 this before, and I was told that date taken indicates an on or
15 before date; that it can be modified by a transfer perhaps or
16 changing some fundamental aspect of a picture like a filter,
17 but a date taken indicates on or before this picture -- this
18 photo was taken on or before whatever the date is.

19 Q. Who told you that?

20 A. Oh I was told that in various trainings over the years
21 dealing with photographic images on phones and things.

22 Q. Do you know if that is actually digital forensic
23 analysis of why two photos would be shown to be taken on two
24 separate dates?

25 A. You would have to ask an expert. I asked an expert and

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1 that's the question I got and the training so --

2 THE COURT: So if it's on a photo, is on or before,
3 and if there's some modification, then the date would
4 necessarily change on that modified --

5 MS. EPP: It can change. That's what I was told that
6 a date taken date can change, which is why I was told to say
7 taken on. If you're referencing that date, you should always
8 say that photo was taken on or before and then you list the
9 date taken.

10 THE COURT: I see.

11 BY MS. SEN:

12 Q. So this is a photo that you discussed yesterday exhibit
13 53B.

14 A. Yes.

15 Q. And it appears to be a selfie photo of Danielle M?

16 A. It does.

17 Q. She's smiling in the photo?

18 A. She is.

19 Q. Can you tell us when this photo arrived on the hard
20 drive?

21 A. I cannot. I also see that the headings are missing on
22 the -- above the data.

23 Q. And do you know what date it arrived on the computer?

24 A. I don't know what date it arrived on the computer.

25 Q. I'm going to show you what the Government admitted

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1 yesterday as 48D. This is a Backpage ad. So when was the ad
2 posted?

3 A. Thursday, October 22nd at 12:21 a.m. in 2015.

4 Q. And when does that say it was created?

5 A. It says user was created on Wednesday, June 3rd, 2015.

6 Q. And when was the e-mail verified for it?

7 A. Monday, March 21, 2016.

8 Q. Why are all those dates different?

9 A. I would assume that a user profile source to use
10 Backpage was created on June 3rd of 2015, but there was no
11 e-mail verification until March.

12 Q. So --

13 A. But the ad was posted on October 22nd. That's what the
14 data is saying.

15 Q. And on the second page of this ad there are three
16 deleted images. What does it mean when they are deleted images
17 with an ad?

18 A. My understanding is those images are associated with
19 that user profile, but they are not going to be used in that
20 ad.

21 Q. So you don't know whether those pictures were actually
22 posted with that ad?

23 A. No. It appears they were not. They are just associated
24 with that user. So that e-mail and that phone number.

25 Q. So were these photos found on the hard drive?

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1 A. The one to the far right was found. Something a lot
2 like it.

3 Q. So you don't know whether it was the same photo or not?

4 A. I would have to look through all the photos of Mandy L.

5 Q. And you wouldn't know what actual -- when it actually
6 arrived on the computer, would you? On the hard drive is what
7 I mean.

8 A. No. I wouldn't know when it arrived on the hard drive.

9 Q. So you conducted some research on Facebook as well and
10 we talked a little bit about Facebook?

11 A. Yes.

12 Q. You accessed various users' profiles; is that correct?

13 A. Meaning I visited their pages?

14 Q. Yes.

15 A. Yes.

16 Q. And in some cases you've testified that you downloaded
17 videos posted on users' Facebook accounts?

18 A. Yes.

19 Q. Just by looking at a Facebook account you don't know who
20 actually posted those videos, do you?

21 A. No.

22 Q. And isn't the only way to actually identify how
23 something has been posted on Facebook is to subpoena Facebook
24 for the records?

25 A. Ask the question again.

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1 Q. In order to determine who might have posted something is
2 one way to subpoena records from Facebook?

3 A. I still don't think you're going to get information as
4 to who posted it. You'll know whether or not it was posted on
5 that user's profile, but you're not going to get -- they
6 couldn't tell you what individual did that.

7 Q. So lots of different people can post things to a
8 Facebook user's account in a public area, isn't that fair?

9 A. If they were -- if they have access and the password to
10 get into that user's account.

11 Q. But other users can post things on someone's wall, for
12 example?

13 A. They can, yup.

14 MS. SEN: Your Honor, may I have a moment?

15 THE COURT: Yes.

16 MS. SEN: Nothing further, Your Honor.

17 THE COURT: Okay. Any redirect?

18 MR. GRADY: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. GRADY:

21 Q. If we could switch from the Elmo back to counsel table,
22 Professor Epp, I'm going to start by showing you 50B-008 -- I'm
23 sorry. 50B-004. Okay. These are the photos that you received
24 questions about on cross examination specifically comparing IMG
25 3027 versus KK 137?

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1 A. Yes.

2 Q. Do you know if KK 137 had been tagged or would anything
3 refresh your recollection as to whether KK 137 had been tagged?

4 A. I believe I saw it in the properties, but I need to look
5 at the properties.

6 Q. Sure. I'm showing you what's been marked as Government
7 exhibit 140 for identification. Take a minute and look at
8 that.

9 A. Yes.

10 Q. And if it refreshes your recollection, I'll take 140
11 back from you. Do you recall if KK 137 had been tagged?

12 A. Yes it was.

13 Q. What had been tagged?

14 A. It was tagged KK and it was also tagged SMH.

15 Q. And if I can show you 47D as in delta -- I'm sorry 48D,
16 okay, you received some questions about this particular ad on
17 cross examination. Now when you received questions about user
18 created on June 3rd, 2015 is that the user that's reflected in
19 the e-mail address jimmyporter380@gmail.com?

20 A. Yes that's the identifier.

21 Q. If we can turn to page 2 of 48D, you received some
22 questions about the photograph, particularly the one all the
23 way on the right?

24 A. Yes.

25 Q. I'm going to hand you what's been marked Government

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1 exhibit 48C for identification. Take a minute and look at 48C.
2 Does 48C appear to be pictures of Mandy that were recovered
3 from the Moet Hart Facebook return?

4 A. They are.

5 MR. GRADY: Your Honor, the Government moves to admit
6 and publish 48C.

7 THE COURT: Any objection to 48C?

8 MS. SEN: If I could just look at it briefly, Your
9 Honor.

10 THE COURT: Yes.

11 MS. SEN: No objection, Your Honor.

12 THE COURT: All right. So admitted.

13 [Government exhibit 48C admitted and published]

14 BY MR GRADY:

15 Q. All right. We're going to go ahead and split the
16 screens, Ms. Epp, and on the right side I'm going to show you
17 48C-002. Is it fair to say that the photograph that I'm
18 circling in 48C-002 bears a remarkable resemblance to the
19 photograph in 48D-002?

20 A. It does.

21 Q. And remind me again 48D-002, if we go back to page 1 of
22 48D, that photograph is associated with the Backpage account of
23 jimmyporter380@gmail.com?

24 A. Correct.

25 Q. Ms. Epp, we had -- you had a few questions related to IP

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1 addresses. Do you recall those?

2 A. Yes.

3 Q. In your experience is the commercial sex industry
4 somewhat transient?

5 A. Yes.

6 Q. Do users change hotels?

7 A. They change hotels. They change phones. Yes.

8 Q. And what impact, if any, does that have on IP addresses?

9 A. The IP address associated with a phone would change if
10 the phones change -- if the user switches out phones, of
11 course. The IP address that would come back on a return like
12 this if someone were using a phone would be the parent company.
13 If somebody is using wifi -- if somebody is using wifi, the IP
14 address is going to change depending on the locations of the
15 wifi, what motel they are at.

16 Q. Speaking of wifi we're losing power, Your Honor, but --

17 THE COURT: All right. Why don't we take a little
18 bit of a break here and wait for the power to come on. Those
19 are obviously emergency lights so -- and the computers are off
20 as well. So all right. Let's take a recess and we'll call you
21 back when the power is established.

22 [Recess. Jury leaves at 10:05 a.m. and returns at 10:22 a.m.]

23 THE COURT: Well apparently there's work being done
24 in the courthouse on the electricity and the question is
25 whether we have sufficient light to continue on and the

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1 consensus at least as came to me is that we could proceed. So
2 it's a little dark, but I think we can proceed. Is does anyone
3 object to that?

4 MR. GRADY: No, Your Honor, not from the Government.

5 THE COURT: Okay, and from the defense?

6 MR. KAPLAN: That's fine, Judge. Thank you.

7 THE COURT: Okay. All right, and if there's any
8 objections from any jurors stand up or forever hold your peace.
9 Okay. All right. So I think we're ready to go.

10 MR. GRADY: Thank you, Your Honor.

11 BY MR. GRADY:

12 Q. Ms. Epp, I believe you mentioned on cross examination
13 that you look at pieces of information or evidence from other
14 than a single source. Was that correct?

15 A. Yes. That's a foundation of intelligence work and both
16 in military intelligence, which I did before, and as a civilian
17 intelligence analyst you have to verify multiple sources of
18 information.

19 Q. You don't look at anything in isolation, is that what
20 you're saying?

21 A. Correct.

22 Q. So would you take the electronic evidence that we've
23 been talking about the last couple of days and also compare it
24 to what Mandy might have said?

25 A. Of course. Yes.

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1 Q. Mary?

2 A. Yes.

3 Q. Ayla?

4 A. Yes.

5 Q. Danielle?

6 A. Yes.

7 Q. Keisha?

8 A. Yes.

9 Q. Katelynn?

10 A. Yes.

11 Q. Jasmine?

12 A. Yes.

13 Q. Final area, Professor Epp, there was some questions
14 relating to Facebook and I wanted to ask simply about the Moet
15 Hart Facebook return. Did you see pictures of the defendant in
16 the Moet Hart Facebook return?

17 A. I did.

18 Q. How many if you had to guesstimate?

19 A. At least dozens.

20 Q. Did some of those pictures -- did you also find some of
21 those pictures on the defendant's hard drive?

22 A. I did.

23 Q. Do you remember which folder within the hard drive you
24 saw some of those pictures in?

25 A. Folders titled things like Me or Me Solo.

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1 Q. Do you recall seeing anything about the defendant's
2 wedding invite in the Moet Hart Facebook return?

3 A. I did see a wedding invite.

4 MS. SEN: Objection, Your Honor. I don't think these
5 things are in evidence that are being discussed.

6 THE COURT: Well in fact I think that they were
7 excluded.

8 MR. GRADY: I'm just responding to the cross
9 examination, Your Honor, about questions of how things can get
10 on Facebook and who puts things on Facebook, things of that
11 nature. I'm not going to show any of the exhibits, Your Honor.

12 THE COURT: All right.

13 MR. GRADY: Just general.

14 THE COURT: Objection overruled. Go ahead.

15 MR. GRADY: Thank you.

16 BY MR. GRADY:

17 Q. And finally, Professor Epp, did you see any discussions
18 on the Moet Hart Facebook return about drugs?

19 MS. SEN: Objection, Your Honor. That calls for
20 hearsay.

21 THE COURT: Well it's unclear as to whether it's a
22 statement of the defendant. Is that your proffer?

23 MR. GRADY: I can clarify, Your Honor.

24 THE COURT: You want to rephrase the question to make
25 sure it's not a hearsay response, but link to the defendant.

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1 MR. GRADY: Yes, Your Honor.

2 BY MR. GRADY:

3 Q. Professor Epp, I just want to focus on statements that
4 Moet Hart may have made in the Facebook return that you viewed.
5 Did you see any statements by Moet Hart referencing selling the
6 narcotics?

7 A. I did.

8 MS. SEN: Your Honor, may we please approach?

9 THE COURT: Yes. Okay. All right. I'm going to
10 turn the husher on.

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1 [Bench conference]

2 THE COURT: So first if it's a statement of the
3 defendant, it's not coming in as a recognition of the agent
4 activity. It's being used, I assume, to validate the linkage
5 between the defendant and Facebook. So what's your objection?

6 MS. SEN: Well on a couple of levels, Your Honor.
7 One is that I think it's beyond the scope of my cross -- of my
8 cross because I wasn't asking her specifically about my
9 client's Facebook page. I was asking her about her undercover
10 investigative techniques and the things that she uses for
11 Facebook on a very general level. In fact, I very specifically
12 did not discuss my client's Facebook account, and in fact I was
13 referencing other Facebook accounts and I was speaking very
14 generally and asking her very generally about how things get
15 posted, how to verify things and other things like that, and
16 this discussion about drugs I think is incredibly prejudicial
17 because you know it leaves the jury with the impression that my
18 client is sort of using the drugs -- and I have to look at the
19 pages that are being referenced because this is a huge return.
20 Who he was talking to about these conversations and all the
21 content comes in and the jury is going to take it as --

22 THE COURT: All right. So as I interpret what you're
23 saying the Government is trying to show the linkage to Facebook
24 and the return being a valid return. What you're suggesting is
25 that to get into issues with regard to drug dealing it opens up

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1 a Pandora's box because you don't know with whom he was
2 speaking, et cetera, and it leaves the impression, which is
3 prejudicial to you, that he's bragging about the fact that he's
4 selling drugs on Facebook.

5 MS. SEN: Yes. That's an accurate --

6 MR. GRADY: And, Your Honor, what I was specifically
7 referencing to is one of the Facebook exhibits we were trying
8 to introduce yesterday was a conversation with Sophie Smith.
9 In that conversation she asked about getting up, which is
10 cocaine, and the defendant directs her to Lori's, things of
11 that nature, and what the Government is intending on doing is
12 the impression that the cross left is that people can put stuff
13 on Facebook and we don't know who or where that comes from, and
14 so we're just trying to respond at least as to the Moet Hart
15 return that that was his. He was not -- other people weren't
16 inserting information on to that.

17 THE COURT: I think this could be really prejudicial.

18 MR. GRADY: Sure. That's fine, Your Honor.

19 THE COURT: I'm going to sustain the objection.

20 MR. GRADY: Yes, Your Honor.

21 [End of bench conference]
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1 THE COURT: Let there be light. Okay.

2 MR. GRADY: Your Honor, nothing further.

3 THE COURT: Okay. Any recross?

4 MS. SEN: No, Your Honor.

5 THE COURT: All right. Thank you, Professor.

6 MS. EPP: Ms. Sen, do you want your exhibit back?

7 MS. SEN: Thank you.

8 THE COURT: All right. Government call your next
9 witness.

10 MR. GRADY: Your Honor, before the Government rests
11 we just wanted to clarify the status of exhibit 78. We believe
12 that it has been admitted. I just want to double-check because
13 I don't know if that was affirmatively in the exhibit list when
14 I checked that.

15 THE COURT: Is 78 in? All right. 78 is in as an
16 exhibit.

17 MR. GRADY: With that, Your Honor, the United States
18 of America rests.

19 THE COURT: All right. I'm going to stay on the
20 bench and speak with the lawyers just for a few minutes. I'm
21 going to ask that you go back to the jury room. The Government
22 has now rested its case so we'll be calling you back in just a
23 matter of -- well probably 15 minutes. Okay.

24 [Jury leaves the courtroom at 10:33 a.m. The following was
25 held in open court without the jury present.]

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1 THE COURT: All right. Turn to the defense. First
2 we need to resolve the issue that the objection that was made
3 by Mr. Folks and that is to review admission of computer
4 testimony. Is there anything else that you want to say about
5 that, Ms. Sen?

6 MS. SEN: Well, Your Honor, the issue is there were
7 two photos taken and they were apparently taken -- they are
8 identical. They were taken on two separate dates, and I mean I
9 think that I would proffer that our computer expert will say
10 that one of the reasons that there are two different dates on
11 that, unlike what Ms. Epp testified to, is that the data has
12 been corrupted. So that won't come in until our case, but I
13 think it's a concern and my client would like to revisit it.

14 THE COURT: All right. Well, first of all, obviously
15 this witness just testified that it is possible that you can
16 have different dates on the same photos because she has been
17 taught that the photo date is on or before, and that in fact if
18 one of those photographs is modified in any particular way, it
19 creates a different date. So as a result it's quite logical to
20 have different dates. Regardless you're asking for a review of
21 the Court's ruling. I'm going to deny that. I think clearly
22 it is admissible and now do you have a motion at close of the
23 evidence?

24 MS. SEN: Yes, Your Honor.

25 THE COURT: Okay.

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1 MS. SEN: We would like to move under Rule 29 for
2 three counts not to go to the jury; Count XI, Count XII, and
3 Count XV. Counts XI and XII are the counts related to Keisha
4 W. Count XV is the count related to Hannah A. So with respect
5 to Count XI Keisha W. was on the stand.

6 THE COURT: Yes.

7 MS. SEN: And that count relates to conduct that
8 occurred during 2013 and the only thing that she testified to
9 was that she met Mr. Folks, she talked to him about
10 prostituting, she tried it once, it didn't work, and she left.
11 There is no evidence that has come in at this trial that shows
12 in 2013 she was forced or coerced in any way to prostitute. I
13 would also say with respect to Count XII, which is the count
14 related to her alleged forced prostitution in 2015, that her
15 testimony -- well, first of all, she remembered very little,
16 but the basics of her testimony is that she may have pros --
17 she went to rehab, she came out, she called Mr. Folks, asked
18 him for help. She prostituted for a couple of weeks and then
19 she left and she took off and came back. She basically said
20 that after they left Lori C's house, which we know is
21 established by the date Lori C. went to rehab which is November
22 11th of 2015, that she wasn't really involved with this and she
23 would come and go. She would ask Mr. Folks for help if she
24 wanted to post on Backpage. There is a Backpage ad that came
25 in from January 2nd. She testified that she herself posted it.

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1 Her testimony was sometimes I would do it, but I asked for help
2 if I didn't have a phone or anything else. The defense
3 believes there's simply not enough evidence that she was forced
4 and anything that she testified to regarding -- there was no
5 testimony that she offered, even though she did testify about
6 events that she -- were uncomfortable and that were -- like
7 participating in the walnut challenge I think that she said --
8 I think she called it the acorn challenge, but there was no
9 testimony suggesting that anything in those events forced her
10 or coerced her in any way to continue prostituting and it's
11 pretty clear that she came and went as she pleased. I'm sorry.
12 Mr. Kaplan is correcting me that the evidence is she basically
13 prostituted for -- with Mr. Folks for two days in June of 2015.

14 THE COURT: Okay. Those are the arguments related to
15 Counts XI and Count XII. Okay. I'm interested in Count XV --

16 MS. SEN: Your Honor --

17 THE COURT: -- in regards to Hannah.

18 MS. SEN: -- there has not been a single witness who
19 has testified in this case that they observed, saw, Hannah act
20 like prostituting.

21 THE COURT: Okay. So it was generally asked of
22 witnesses as to who other people were engaged in the commercial
23 sex act. Nobody said Hannah did. So the Government has a
24 number of photographs and they have a linkage of a couple of
25 photographs -- I think a couple -- involving multiple

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1 individuals, either between two and four, and they have it
2 linked to the Backpage ad. You have said that there's a change
3 in the law in 2015 and prior to 2015 of course this was --
4 involving Hannah this was 2013.

5 What you're suggesting is the advertisement is not a
6 commercial sex act unto itself. That you have to actually show
7 that there is a commercial sex act and there's no testimony
8 that Hannah engaged in a commercial sex act other than the
9 advertisement, and what you're suggesting is prior to 2015 the
10 only commercial sex act theoretically in a large sense they
11 would have Hannah engaged in is the taking of photographs and
12 the advertising on Backpage. I mean is that essentially your
13 argument?

14 MS. SEN: Yes, Your Honor, and I would also point out
15 that the one witness who was in that series of photos with
16 Hannah is Jasmine L. and when asked directly by the prosecutor
17 did you ever see Hannah act -- Hannah A. go out on a date? Did
18 she prostitute? She said no and she was the woman who was in
19 that photo with her.

20 THE COURT: Right, and I listened to all of the
21 witnesses who described other people who were engaged in a
22 commercial sex act and Hannah was never mentioned, and so
23 there's no technical direct evidence of her engaging in
24 prostitution. All right. So, okay, let me ask the Government
25 for your response. First in regard to Counts XI and XII.

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1 That's Keisha.

2 MR. GRADY: Yes, Your Honor.

3 THE COURT: What's your position?

4 MR. GRADY: Yes. Our position is that there is some
5 evidence of force and coercion. I will start with Count XI
6 that is Keisha's time period in the summer of 2013. She stated
7 that she was engaged in prostitution to keep well, as in to not
8 keep sick, but also more importantly she said she had to have
9 sex with the defendant and she said that was part of his
10 control in order to show that he's the boss. So we are -- we
11 believe that is some evidence to support force as it applies --
12 force and coercion as to Count XI.

13 Now as to Count XII not only do we have again how Keisha
14 testified that heroin was her biggest problem and led her to
15 come back to the defendant, but we have also reputational harm.
16 She testified that she saw the picture of Hannah and that
17 caused fear in her mind, and she also talked about the
18 humiliation of the walnut challenge and being urinated on by
19 the defendant. Again two of the probably most horrific things
20 in the world that can show someone controls another person.

21 Now the fact that -- and also I should remind the Court
22 that she also took bags of heroin from Chrissy and there was
23 this whole bounty that was put out on her and Hannah helped
24 bring her in, and afterwards the defendant, as Keisha said,
25 raped her behind a dumpster in a cemetery and then said you

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1 work for me now. So the important thing to keep in mind, Your
2 Honor, is that 1591 looks at the means that were used and not
3 the actual result. It doesn't matter whether Keisha actually
4 engaged in commercial sex act or not. The statute says would
5 be cause and that's why it's focused on the mean, and certainly
6 in the Government's view that's some evidence of coercive means
7 applied against Keisha as for Count XI and for Count XII.

8 If you have further questions, Your Honor, I'm going to
9 move to Count XV which is the Hannah account.

10 THE COURT: Yes. That's fine. I'm interested in
11 your theory in regard to Hannah.

12 MR. GRADY: Sure. So I'll remind the Court of the
13 four elements that are necessary to sustain a conviction for
14 Count XV. The first one is a litany of seven verbs that the
15 defendant recruited, enticed, harbored, transported, provided,
16 uptained, maintained. Certainly a posting of the Backpage ad
17 the Government would suggest is indication that he was
18 providing Hannah for commercial sex because if anything in this
19 trial everyone has talked about Backpage and that's how you
20 recruit and solicit clients. So the Government believes that
21 one of the seven verbs in that first element has been met.

22 Going to the second element, the second element requires
23 that the defendant know that Hannah was 18 or below, recklessly
24 disregard or reasonable opportunity to observe. The testimony
25 of Jasmine was that it was the defendant who was taking these

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1 pictures for this advertisement. So the Government believes
2 that is evidence showing that the defendant has a reasonable
3 opportunity to observe Hannah.

4 THE COURT: Let me ask you about your indictment.

5 MR. GRADY: Yes, Your Honor.

6 THE COURT: I know the "and" "or" about is an issue
7 that I've addressed before, but if you look at the statute it's
8 disjunctive, it's "or", right?

9 MR. GRADY: Yes.

10 THE COURT: And charge "and". You charge "and". The
11 logical reading of that would be that you have to prove all
12 three. Okay. So do you have case law to suggest that when you
13 charge by way of an indictment and that it really is
14 established by "or"? That is you just prove one of the three?

15 MR. GRADY: Yes, Your Honor. So a couple of
16 responses. One, I don't have the case off the top of my head,
17 but there is a case Robinson out of the 2nd Circuit --

18 THE COURT: Ms. Savner has a case on the top of her
19 head.

20 MR. GRADY: Exactly. There's a case Robinson in the
21 2nd Circuit that says you can prove minor sex trafficking in
22 any of those three matters, and of course that was briefed
23 before Judge Crawford, but more to your point, Your Honor --

24 THE COURT: No. I understand that it's "or", but
25 when you charge "and" in the indictment is that a mistake

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1 without significance?

2 MR. GRADY: No, Your Honor, that was an intentional
3 move. It's all of -- I think I have to look at the DOJ
4 guidelines, but the DOJ practice is to charge in the
5 conjunctive prove in the disjunctive because if we have "or"
6 for everything, then we don't know exactly what the jury would
7 decide upon; whether they find that he knew, did they find that
8 he recklessly disregard, did he have a reasonable opportunity
9 to observe. That's why we put "and" in there, and if you want,
10 Your Honor, what we can do is do a special verdict form where
11 we say okay if count so -- excuse me. If element two has been
12 met, which one do you find beyond a reasonable doubt, and going
13 back to the Rule 29 motion, Jasmine's testimony that it was the
14 defendant taking the pictures certainly leaves some evidence
15 that he had reasonable opportunity to observe her.

16 THE COURT: All right. You have case law which says
17 that you can -- you can charge in the conjunctive but all you
18 have to prove is the disjunctive; that is just one as opposed
19 to all three?

20 MR. GRADY: Yes, Your Honor.

21 THE COURT: Okay. So go ahead.

22 MR. GRADY: The third element is that --

23 THE COURT: Let me go back to the next question.

24 MR. GRADY: Sure.

25 THE COURT: You've seen in the request for a jury

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1 charge made by the defense that the law essentially changed in
2 2015. The defense is arguing that the mere advertising,
3 broadcasting availability for services is not a commercial sex
4 act. It became a commercial sex act in 2015. This was 2013.
5 At that point the actual advertising or broadcasting her
6 availability on Backpage is not a commercial sex act.

7 MR. GRADY: Your Honor, the Government disagrees and
8 for a few reasons. Number one, if you look at the seven verbs
9 that are in the indictment and that existed in 2013, we believe
10 that advertising someone for commercial sex is contained within
11 any of those seven verbs. Most obviously providing, right,
12 because if you're going to provide someone to a client, there
13 has to be a way to advertise their services or solicit services
14 from clients. So in the Government's mind the addition of
15 advertising and soliciting in 2015 is essentially unnecessary,
16 but I'm not going to comment on what Congress can and can't do
17 with their statute.

18 The other thing that's interesting about advertising, Your
19 Honor, is even though it was added in 2015 the mens rea is
20 different for that as opposed to the remaining nine verbs that
21 we now have in 1591. The mens rea for advertising is knowing,
22 you cannot reckless disregard advertising, and so frankly in a
23 lot of the indictments that the Government seeks we just keep
24 advertising out because it's confusing to have one mens rea
25 with advertising and different -- a different mens rea for all

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1 the other nine verbs in 1591. So in the Government's view the
2 whole thing about advertising being added in 2015 really is a
3 red herring and does not apply to the facts of this case and
4 whether the facts of this case can meet the elements of a law
5 as it existed in 2013.

6 THE COURT: All right. So are you acknowledging that
7 your theory is in regard to Hannah that the commercial sex act,
8 the gravamen of the offense here is in the advertising?

9 MR. GRADY: Yes, Your Honor, but I would also say the
10 gravamen also could be, as we heard from Jasmine, recruiting
11 and enticing because think about the circumstances. This is a
12 picture that's going on, you know, very late at night. Also
13 remember the context of it being in a hotel room, and of course
14 in hotel rooms that's where commercial sex activities operate.
15 The defendant is taking pictures of her is also indicia under
16 Rule 29 of recruiting and enticing someone.

17 THE COURT: So your argument then is forget
18 advertising. If he is enticing her or encouraging her in any
19 way to participate in prostitution, that is the offense and
20 doesn't make any difference whether she engages in a sex act,
21 it is the enticement to engage in a sex act which is the
22 gravamen of the offense?

23 MR. GRADY: Exactly, Your Honor. You think back to
24 Jasmine's testimony. She said that the defendant was the one
25 who, you know, instructed Jasmine -- or, excuse me, instructed

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1 Hannah to, you know, put her thumbs on the scantily clothes
2 that she had on. So again we believe that those facts support
3 that theory.

4 THE COURT: Okay.

5 MR. GRADY: And if Your Honor wants, I can hit the
6 third and fourth elements of minor sex trafficking if you want.
7 The third one is that Hannah would be caused to engage in
8 commercial sex act. So unlike the defense's view we don't have
9 to show that Hannah actually followed through and saw a client.
10 Again it's the future tense would be cause and that's in the
11 statute. You don't have to find an effect, and I believe
12 there's a 2nd Circuit case called Alvarez to that effect, and,
13 finally, the fourth element in and affecting interstate
14 commerce, we have evidence of a Backpage ad, but also this
15 certainly occurred at the Motel 6 in Colchester which is a
16 hotel that serves out-of-state customers. Any one of those is
17 sufficient to meet the interstate commerce connection. So for
18 those reasons we believe it should go to the jury.

19 THE COURT: All right. Do you want to respond?

20 MS. SEN: With respect to the idea that you can now
21 -- that somehow we should just forget about the fact that
22 Congress has changed the statute to now prohibit advertising is
23 very clear that under the 2013 law advertising is not an
24 offense, and in fact the Government made that argument in
25 response to our request related to the Backpage records prior

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1 to trial, and in fact that language that I have offered in the
2 jury charge is taken directly from the Government's response,
3 and the Government at that point is saying well, you know, we
4 don't have to show, you know, advertising wasn't illegal so it
5 doesn't really matter. That was basically their position with
6 respect to why when we moved to exclude Backpage records.

7 Now the Government is suggesting that they can simply
8 prove this charge by showing that there was this ad created and
9 it's not even clear. The Government hasn't actually -- the
10 Government subpoenaed all these Backpage records, Your Honor.
11 They didn't actually get a return from Backpage on this
12 particular ad, and that was one of the issues that was raised
13 by prior counsel which is that there's no evidence and in fact
14 there's no evidence at all that that Backpage ad was actually
15 live. Every single witness who was asked, every single woman
16 who was involved in prostitution who testified in this
17 courtroom testified -- no one of them testified that Hannah was
18 involved in prostituting. There was plenty of evidence that
19 she was involved in drug dealing. There was plenty of evidence
20 that she had a sexual relationship with our client.

21 THE COURT: Okay. So what about the Government's
22 argument that enticement is the gravamen of the offense, that
23 -- and the offense is completed when, by argument, the
24 defendant made an effort to take photographs and to entice her
25 to engage in prostitution.

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1 MS. SEN: Your Honor, I just don't -- I guess I just
2 don't see the facts as showing that at all, and I would
3 disagree with -- I mean the one person who responded who is
4 here -- the one live witness that they had said that she
5 responded to that ad, she never saw Hannah respond to that ad.
6 I mean there's no indication that she was enticed to do
7 anything. I mean she's not here obviously to testify as to
8 whether she was or not, but there is that one picture is what
9 that entire count is based on, and I think it would be highly
10 prejudicial based on the absolute lack of evidence for that to
11 go to the jury.

12 THE COURT: Why would it necessarily be prejudicial
13 to other counts? You know I appreciate that this is a -- this
14 is a complicated issue. I listened carefully because I knew
15 obviously Count XV is a matter that's -- that is controverted
16 and I agree with you completely that nobody has said that she
17 engaged in a sex act. So there's no testimony about that, but
18 then the Government brings up this enticement, and the argument
19 is that this change in the law in 2015 was not necessary. That
20 engaging in this kind of advertisement is -- in fact is a sex
21 act essentially.

22 MS. SEN: Well I completely disagree with the change
23 in the law. The law is the law, Your Honor, and the Government
24 can argue -- I mean the Government previously argued that there
25 was a change in the law and it had some effect. Today it wants

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1 to argue that the change in the law has no impact. I mean
2 that's the Government's position. I understand that. With
3 respect to this idea of enticing, even if that is all it takes
4 to have a criminal conviction involving a mandatory minimum
5 sentence, I mean I just think it would be outrageous in this
6 case given the evidence. The idea is that now the Government
7 -- sure the Government can argue to the jury anything it wants,
8 but there is not any evidence in this case that our client
9 enticed her. None.

10 THE COURT: Well she engaged in pictures being taken.
11 It had to be fairly obvious to her, who had been around for
12 quite a while, that these other women who were engaging in
13 these photographs had been engaged in prostitution. Is there
14 not some circumstantial evidence that she may have at least
15 thought that she was being enticed into engaging in
16 prostitution?

17 MS. SEN: She's not here to say that she thought
18 that.

19 THE COURT: I appreciate that.

20 MS. SEN: That's part of the problem, Your Honor. I
21 mean, you know, we're sort of ascribing all of the responses
22 and reactions to someone whose picture -- whose photo was
23 taken. It is not clear at all. It is very clear that she had
24 a sexual relationship with Mr. Folks and is that enticing
25 someone to cause someone to engage in prostitution? I don't

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1 think so. I don't think just because you have naked photos,
2 and of course there are plenty in this case, that that amounts
3 to prostitution. There has to be something else and I don't
4 think that there's -- I mean clearly the defense --

5 THE COURT: Let me ask both sides do you have
6 research to indicate that either advertising was or was not a
7 gravamen of the offense prior to 2015? In other words, if -- I
8 mean what Congress usually does is react to particular
9 decisions that are made by courts, and if they then now say
10 advertising is a part of the commercial sex act, are they
11 reacting to decisions from other courts or from courts which
12 said that in fact posting for photographs and advertising is
13 not a commercial sex act. Were there cases out there which
14 said that in which case you would have a fairly close nexus to
15 the defense argument that advertising was not considered a sex
16 act when the charges were brought.

17 MR. GRADY: Your Honor, I would have to look, but my
18 recollection is there is no case out there holding that
19 advertising alone is insufficient and so we're going to throw
20 out this conviction because it was just posted on Backpage.

21 What I would -- what I would say, Your Honor, is, for
22 example, a lot -- in some cases like there's this Jungers
23 (phonetic) case out of the 8th Circuit where it was an
24 fictitious minor that the client was going to see and that
25 person was still convicted and upheld on appeal, but that's

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1 where Congress said well maybe we should get solicit in there,
2 but the Court -- the 8th Circuit said with these seven verbs
3 what the John did is criminal and it is appropriate, and I
4 would just like to make three last points, Your Honor, just to
5 respond.

6 First about the Backpage ad, Jasmine testified that she
7 remembered seeing the Backpage ad; that it went out there.
8 Number two, the phone number in that Backpage ad was subscribed
9 to by Svetlana. If the remember the recording yesterday of
10 Svetlana, she talked extensively with the defendant about
11 posting a girl and she's not getting posted and she's not
12 getting money in her pockets then she doesn't need to be here,
13 which again is circumstantial evidence that the reason you're
14 posting someone is to make money engaging in commercial sex act
15 and all that stuff, and we would say that is some indicia of
16 being provided; and then finally number three, as far as
17 enticement or whether she consented, all of that is irrelevant
18 because 17 years old under federal law cannot consent to sexual
19 activity much less prostitution.

20 THE COURT: But then you have to -- that's the
21 interesting part of your argument. What you're suggesting is
22 the enticement itself morphs into a commercial sex act. So if
23 you don't have advertising, there's no advertising as a
24 commercial sex act and she's not engaged in any commercial sex
25 act, you have no evidence to suggest that she's engaged in a

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1 commercial sex act, then the only commercial sex act that you
2 claim the defendant engaged in, this all of a sudden becomes --
3 well this is interesting because then you're shifting this to
4 the defendant engaged in a commercial sex act. He is enticing
5 her.

6 MR. GRADY: Your Honor, perhaps an example may help
7 flush this out again just using the four elements. So say that
8 the defendant goes up to someone on the street and starts
9 recruiting them saying hey if you come work for me, prostitute
10 for me, I'll give you x amount of money and so that is the
11 recruitment pitch, and he sees this person, has a reasonable
12 opportunity to see them in person, and they are actually 16
13 years old and he tells them hey I can post you on Backpage, I
14 can get you -- I'll put you in a hotel room at Motel 6 and, you
15 know, this goes on for half of a day, but ultimately the
16 16-year-old changes her mind and never goes through with
17 anything. Under 1591, and again Robinson talks about how it is
18 essentially a strict liability offense that is sufficient for a
19 conviction under the law because he's recruiting, had
20 reasonable opportunity to observe the victim, intending -- or
21 knowing there would be cause to engage in sex act, and of
22 course if there's Backpage -- using Backpage or hotels, that is
23 an interstate commerce connection. So that's an example of how
24 recruiting alone is criminally liable under the law.

25 THE COURT: Right, but you're arguing that she's

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1 being enticed.

2 MR. GRADY: Well one of seven verbs, Your Honor.

3 THE COURT: Enticed into a commercial sex act. The
4 commercial sex act then has to be prostitution and she's being
5 enticed into prostitution.

6 MR. GRADY: We would say, Your Honor, that can be
7 based upon the view of the facts. Whether it's recruiting,
8 enticing, providing, we believe the facts fit any one of a
9 number of those seven verbs that the first element prohibits.
10 At least there's some evidence under Rule 29.

11 THE COURT: All right. Well you should know that I
12 have support staff out conducting research at this point back
13 into 2015. The change -- whether the change is based upon
14 existing law which is advertising is not a commercial sex act.

15 At this point -- obviously this motion can be raised at
16 the close of the evidence -- I'm going to deny the motions.
17 We'll proceed to the defense's case at this point, and I would
18 like -- I'm going to be conducting further research and ask
19 counsel as well. This whole idea of enticement I had thought
20 advertising. This is what the Government's theory is so that
21 she is participating in the advertising which is a commercial
22 sex act. So then by encouraging her to participate in this
23 commercial sex act, i.e. advertising, that was sufficient. Now
24 if the commercial sex act or the advertising is not a
25 commercial sex act, that shifts the Government's theory to say

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1 that the commercial sex act has to be the prostitution. So
2 then you shift to not just advertising but to enticement;
3 enticement to engage in a commercial sex act. Well is the
4 taking of photographs with other people who are known by her to
5 be prostitutes and known that it was going to go to Backpage
6 theoretically is that enticing her to engage in commercial sex
7 act. Right. So that, as I think about this off the top of my
8 head, is where we're headed.

9 MR. GRADY: Yes, Your Honor, and one final thing to
10 point out in the advertisement itself you notice how you can
11 pick 1, 2, 3, or 4. We again, just based upon that language
12 within there, that indicates some indicia evidence of
13 providing. He's going to provide 1, 2, 3, 4; the teacher, I
14 can't remember exactly the specifics, but if you look closely
15 at that language, we would say that suggests providing.

16 THE COURT: Okay. All right. So I'm going to be
17 conducting the research. We'll go through this discussion
18 again.

19 MS. SEN: Would you like briefing on it from the
20 parties, Your Honor?

21 THE COURT: Yes I would love briefing from the
22 parties on it. Yes. I mean you've got a very brief memorandum
23 in support of your instruction on Count XV, but I would like
24 much more.

25 MS. SEN: I'm happy to do that, Your Honor.

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1 THE COURT: Because this is -- this may be a shift in
2 theory, right. If you're talking about enticement or
3 encouraging her to engage in commercial sex act, the commercial
4 sex act is not the photograph because their theory was the
5 photograph is the commercial sex act, right? So now it's to
6 engage in prostitution. They are encouraging her to engage in
7 prostitution by obviously taking the photographs, but also
8 there was other evidence of enticement. So somewhat of a
9 change of theory I think. All right. Do we need a break of
10 just a couple minutes before you start?

11 MR. KAPLAN: Two minutes, Judge.

12 THE COURT: Two minutes. Okay.

13 [Recess 11:05 a.m - 11:10 a.m. The following was held in open
14 court with the jury present]

15 THE COURT: Okay. Welcome back. The Government has
16 rested. Now it's the defense's opportunity if they choose to
17 put on witnesses and, Mr. Kaplan.

18 MR. KAPLAN: Thank you, Judge. The defense would
19 call Ariel Otero to the stand.

20 DEPUTY CLERK: Please come forward to be sworn, Ms.
21 Otero. You can come right upfront here.

22 ARIEL OTERO,

23 Having been duly sworn, testified as follows:

24 THE COURT: Good morning, Ms. Otero.

25 THE WITNESS: Good morning.

Ariel Otero

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1 DIRECT EXAMINATION

2 BY MR. KAPLAN:

3 Q. Ariel, can you sit close to the microphone? You're kind
4 of soft spoken.

5 A. Yeah.

6 Q. Would you state your full name please?

7 A. Ariel Lauren Otero.

8 Q. How do you spell your last name?

9 A. O-T-E-R-O.

10 Q. And do you live in Burlington?

11 A. Yes.

12 Q. Where were you born?

13 A. In Bronx, New York.

14 Q. And did you come to Vermont at some point?

15 A. Yes.

16 Q. And when was that?

17 A. When my daughter was five months about almost five years
18 ago.

19 Q. And you have children?

20 THE COURT: Okay.

21 A. Yes.

22 THE COURT: Would you move that microphone closer to
23 you. You have to speak right into the microphone so that
24 people can hear you. There you go. Just think you're a rock
25 star.

Ariel Otero

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1 MR. KAPLAN: That's what I told her, Judge.

2 THE COURT: Right.

3 BY MR. KAPLAN:

4 Q. So how old are your children?

5 A. 5 and 9 months.

6 Q. And what are you doing now besides taking care of two
7 small children?

8 A. I'm going to school to become a phlebotomist.

9 Q. Where are you going to school?

10 A. Vermont Adult Learning.

11 Q. Okay. Do you know Brian Folks who is sitting in the
12 courtroom here?

13 A. I do.

14 Q. Could you tell us please how you met him?

15 A. About around the end of 2015 downtown.

16 Q. And what happened?

17 A. Me and one of his sister-in-laws got into like a dispute
18 and like he intervened and stopped our argument and stuff like
19 that so --

20 Q. And how did you end up meeting him? Did he give you a
21 phone number or something?

22 A. Yeah. We chatted a little and then we exchanged
23 numbers.

24 Q. And at some point did you have contact with him again?

25 A. Yes.

Ariel Otero

72

1 Q. Could you please tell us what that was?

2 A. My ex was very abusive and he fractured my nose and I
3 was going through my phone deciding who I was going to call. I
4 need to get away from my situation so I called him up and --

5 Q. When you say you called him you mean Brian?

6 A. Yes.

7 Q. And tell us about the conversation please.

8 A. I just told him like I needed to get away from my
9 situation. I told him what my ex had did to me and I needed a
10 place to stay for a little while until I could get on my feet.

11 Q. Did you consider it an emergency?

12 A. Yes. In that situation, yes.

13 Q. So what happened as a result of that phone call? What
14 did Brian say to you, if anything?

15 A. He told me that he had a friend who had a place and she
16 was living by herself, and if I didn't mind living with
17 somebody, I can stay there.

18 Q. Was that on North Union Street?

19 A. Yes.

20 Q. Who was the friend?

21 A. Mandy.

22 Q. Did you go there?

23 A. Huh?

24 Q. Did you stay there?

25 A. Yes.

Ariel Otero

73

1 Q. And how long did you stay there for?

2 A. Up until the lease was over.

3 Q. That's in June of 2016?

4 A. Yeah around June/July. Around there.

5 Q. Did you pay rent?

6 A. I didn't have to. He told me I didn't have to pay rent
7 because I was homeless and didn't have anything much to me. So
8 he told me I didn't have to, but I didn't feel comfortable
9 staying somewhere that I didn't contribute a little bit too so
10 --

11 Q. And how did he treat you?

12 A. Fine. Like a normal house guest.

13 Q. And was he respectful toward you?

14 A. Yeah.

15 Q. And how did he treat Mandy from your observations?

16 A. Fine as well, you know.

17 Q. Were you working as a prostitute at that point?

18 A. Yes.

19 Q. And how long had you been doing that?

20 A. Quite a while. Way before I met him.

21 Q. And did he speak to you about that?

22 A. He did.

23 Q. Tell us about that conversation please.

24 A. He said that I was very pretty and I didn't have to do
25 any of that.

Ariel Otero

74

1 MS. SAVNER: Objection, Your Honor. This is hearsay.

2 THE COURT: No. Hearsay it's the defendant.

3 MS. SAVNER: Yes, but the rule is that a party
4 opponent can elicit the statement of the party opponent -- the
5 party can't elicit their client's statement.

6 THE COURT: That's true, but then the second point
7 isn't this being offered not necessarily to prove the truth of
8 the matter asserted therein. She is describing conduct
9 essentially in the way he treated others.

10 MS. SAVNER: Well he's asking specifically what was
11 said.

12 THE COURT: Well that's -- that's how you do it.
13 That's how you establish that. So objection overruled. It all
14 is relevant to conduct.

15 BY MR. KAPLAN:

16 Q. So you were encouraged to get out of prostitution?

17 A. Yes.

18 Q. And you were working in that field while you lived at
19 North Union Street?

20 A. Yes.

21 Q. And did Brian require that you pay him anything that you
22 made?

23 A. No.

24 Q. Did you eventually stop doing that?

25 A. Yes.

Ariel Otero

75

1 Q. Do you recall a time around February 10th of 2016 when
2 Mary was at the house?

3 A. Yes.

4 Q. You know who Mary is?

5 A. Uh-huh.

6 Q. You have to say yes or no.

7 A. Yes.

8 Q. And could you tell the jury please what you observed?
9 Did you see Brian and Mary interact?

10 A. They were just talking.

11 Q. Where were they talking?

12 A. They talked in the bedroom with the door open.

13 Q. The door was open?

14 A. Uh-huh. Yes.

15 Q. Could you hear what they were saying?

16 A. No. They were whispering to each other.

17 Q. And were you sitting on the couch with Mandy?

18 A. I was.

19 Q. If something like an assault had taken place in that
20 bedroom, do you think you would have heard it?

21 A. Yes. It's a very, very small house.

22 Q. And what would you have done if you had heard something
23 like that?

24 A. I would have intervened. I would have done something.
25 Probably kicked the door.

Ariel Otero

76

1 Q. Did the federal agents come speak to you the other day?

2 A. They did.

3 Q. And how did you feel about that conversation?

4 A. A little intimidated.

5 Q. And why was it intimidating?

6 A. Well one of their first questions to me was, was I going
7 to court and was I going to testify, and then every other
8 question on top of that was pretty much I felt badgering.

9 MR. KAPLAN: I have nothing further, Your Honor.

10 THE COURT: All right. Any cross examination, Ms.
11 Savner?

12 MS. SAVNER: Yes, Your Honor.

13 CROSS EXAMINATION

14 BY MS. SAVNER:

15 Q. Good morning, Miss Otero.

16 A. Good morning.

17 Q. We haven't met before, have we?

18 A. No.

19 Q. Okay. You mentioned that some agents came over to your
20 house and talked to you the other day?

21 A. Yes.

22 Q. You let them in?

23 A. Yes.

24 Q. Let them sit down?

25 A. Uh-huh.

Ariel Otero

77

1 Q. You talked to them about an hour?

2 A. Yes.

3 Q. They told you, you weren't in any trouble?

4 A. Yes.

5 Q. Told you, you didn't have to talk to them?

6 A. No they didn't say that.

7 Q. Well they did tell you, you weren't in any trouble,
8 right?

9 A. Yes.

10 Q. So you didn't know Mr. Folks at all before the end of
11 2015; is that right?

12 A. Yes.

13 Q. Okay. So you met him that one time as you described,
14 correct?

15 A. Yes.

16 Q. And then it was when something bad happened to you with
17 an ex that you got in touch with Mr. Folks again in mid 2016,
18 right?

19 A. Yes. In the beginning, yes.

20 Q. In the beginning of what?

21 A. February.

22 Q. Okay, and you stayed at the house on North Union from
23 February until when the lease was up in June, right?

24 A. Yes.

25 Q. And that's when the drug business out of the house was

Ariel Otero

78

1 slowing down, right?

2 A. I wouldn't know.

3 Q. Well you were in the house, right?

4 A. I was in the house, but as a guest. I would leave in
5 the morning and appear again at night.

6 Q. Okay and that's because you worked on Backpaging?

7 A. Yes.

8 Q. You had a sexual relationship with Brian Folks, correct?

9 A. A couple times.

10 Q. And he was the one that gave you permission to stay at
11 the house on North Union, right?

12 A. Yes.

13 Q. Okay. That was his place as you understood it?

14 A. He shared it, yes, with Mandy.

15 Q. He wasn't living there, right?

16 A. No.

17 Q. He was just in and out?

18 A. Yes.

19 Q. And you knew Mandy was in love with him, right?

20 A. She spoke on that, yes.

21 Q. She referred to him as her Prince Charming?

22 A. Yes.

23 Q. Okay, and you stopped living there when the lease ended
24 at 103 North Union, and from there you went to the house of the
25 mother of his child Danielle Degenhardt, right?

Ariel Otero

79

1 A. Yes.

2 Q. At 96 Ethan Allen?

3 A. Yes.

4 MR. KAPLAN: Objection, Your Honor. This is outside
5 --

6 THE COURT: Objection overruled. Explore that on
7 cross.

8 BY MS. SAVNER:

9 Q. You so followed Mr. Folks from 103 North Union to where
10 he was at his -- the house of his baby's mother, correct?

11 A. Yes.

12 Q. And you were at that house in fact when Mr. Folks was
13 arrested?

14 A. Yes.

15 Q. And the search warrant was executed there?

16 A. Yes.

17 Q. And you stayed close to him for a while even after he
18 went to jail, right?

19 A. A little while, yes.

20 Q. Called him a few times when he was in jail?

21 A. Yes.

22 Q. Had a conversation?

23 A. He had called me.

24 Q. You talked on the phone multiple times when he was in
25 jail?

Ariel Otero

80

1 A. Yes.

2 Q. You weren't a heroin user --

3 A. No.

4 Q. -- when you were Backpaging, right?

5 A. No.

6 Q. You weren't -- have you ever used heroin?

7 A. No.

8 Q. Crack?

9 A. No.

10 Q. How old are you?

11 A. 26.

12 Q. Okay. So you were around 23 when you knew Mr. Folks in
13 2016?

14 A. Yes.

15 Q. And in all that time you had never done heroin or crack?

16 A. Nope.

17 Q. So you weren't prostituting doing Backpage to support a
18 heroin or crack addiction?

19 A. No.

20 Q. You said he was respectful of you; is that right?

21 A. Yes.

22 Q. Did you know that he took videos of the two of you
23 having sex?

24 A. Yes.

25 Q. He recorded those videos and made logs of them in a

Ariel Otero

81

1 notebook. Did you know about that?

2 A. Yes.

3 Q. Along with all the other women he was having sex with?

4 A. I didn't know about the other women, but I knew me.

5 Q. You knew about Mandy, right?

6 A. What? That she had tapes too with him?

7 Q. That she was also sleeping with him?

8 A. Oh yes.

9 Q. And when you were posting yourself on Backpage you
10 started doing that before you met the defendant, right?

11 A. Yes.

12 Q. So you already knew how it worked?

13 A. Yes.

14 Q. You were posting yourself?

15 A. Yes.

16 Q. You had money for phones and you did that all yourself?

17 A. Yes.

18 Q. You didn't need help from him to do that?

19 A. No.

20 Q. And you were making about five hundred dollars a day
21 from Backpaging when you were working at North Union, right?

22 A. Yes.

23 Q. You didn't do the dates in the house, you left the house
24 and did them at hotels?

25 A. Yes.

Ariel Otero

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1 Q. Okay, and while you were staying at Ethan Allen you were
2 also Backpaging, right?

3 A. Yes.

4 Q. And with some of that money, although he didn't require
5 you, in your words, to pay you did pay to help support his
6 house at 103 North Union, right?

7 A. Yes.

8 Q. And you did pay to help support his house at 96 Ethan
9 Allen, right?

10 A. Yes.

11 Q. You said that you don't -- you didn't know that drugs
12 were being sold out of the house on North Union. Is that your
13 testimony?

14 A. Yes.

15 Q. Well you have had experiences being around other
16 individuals involved in drug trafficking before, right?

17 A. Yes.

18 Q. Your ex-boyfriend is Kevin Takerose (phonetic); is that
19 right?

20 A. Yes.

21 Q. And in January 2017 he was convicted federally for
22 dealing heroin?

23 A. That's what I was told, yes.

24 Q. And you used to hang out with him?

25 A. Uh-huh. Yes.

Ariel Otero

83

1 Q. Is that yes? And Daniel is another one of your ex's; is
2 that right?

3 A. He's my daughter's father.

4 Q. Is he one that broke your nose?

5 A. No.

6 Q. Okay. Well Daniel put you in the same kind of
7 situation, right? Did you mean a trap house?

8 A. At the time it wasn't and then it became one, yes.

9 Q. Okay. So you knew what living in a trap house looked
10 like?

11 A. Yes.

12 Q. So sometimes you went out with Mandy from the house on
13 103 North Union when she did hand to hands, right?

14 A. No.

15 Q. Well you left the house together, right?

16 A. Uh-huh.

17 Q. Is that a yes?

18 A. Yes.

19 Q. You would go for a little walk?

20 A. Yes. I would go one way, she would go another, and meet
21 back up.

22 Q. Okay. You described it as you would slow walk while she
23 did her thing?

24 A. Yes.

25 Q. Okay, and you knew it was better if you didn't have

Ariel Otero

84

1 questions, right?

2 A. Yes.

3 Q. Because in case you were in a situation just like this
4 you didn't want to have to testify about what you did or didn't
5 see, right?

6 A. Not only that, but it's none of my business to be asking
7 questions in a house that I do not -- I can get kicked out any
8 time so --

9 Q. So you didn't ask Mandy questions about what she was
10 doing?

11 A. No.

12 Q. You didn't ask Mr. Folks questions about what he was
13 doing, right?

14 A. No.

15 Q. You didn't want to know?

16 A. No.

17 Q. You saw him do the same kind of trips in and out of the
18 house on Ethan Allen Parkway when you guys moved in there
19 though, right?

20 A. Yes, but he was going to see his child and his wife. He
21 had a wife so --

22 Q. That's what he told you?

23 A. He does have a wife.

24 Q. Well yes, but that's what he told you as to where he was
25 going?

Ariel Otero

85

1 A. To go pick up his kid and bring him back over which is
2 what he used to do.

3 Q. Okay, and you weren't keeping an eye on him all the
4 time?

5 A. He's not my boyfriend.

6 Q. You went on multiple trips with Mr. Folks and Mandy to
7 New York; is that right?

8 A. Yes.

9 Q. You drove down with the two of them?

10 A. Yes.

11 Q. You would drive the car?

12 A. Sometimes, yes.

13 Q. He told you he would want to see family or something
14 like that?

15 A. Yes.

16 Q. You two would split up?

17 A. Yes.

18 Q. Meet back up?

19 A. Yes.

20 Q. Drive back?

21 A. Uh-huh. Yes.

22 Q. And you don't know what he was doing when you weren't
23 there, right?

24 A. No.

25 Q. So you never knew Mr. Folks in 2015 when he was

Ariel Otero

86

1 operating out of a different house before the North Union
2 house, right?

3 A. No.

4 Q. So you didn't see anything that happened at that house?

5 A. No.

6 Q. Did you ever go to his Uncle Marty's house?

7 A. No.

8 Q. So you don't know what happened there?

9 A. No.

10 Q. You testified that on February 10th you were in the
11 house and Folks and Mandy discovered that the stash had been
12 stolen out of the car, right?

13 A. No.

14 Q. You don't remember that?

15 A. No.

16 Q. You just remember a time when Mary came over?

17 A. Yes.

18 Q. Okay, and shortly after that you left the house with
19 Mandy and Q, right?

20 A. No. Just Mandy.

21 Q. You didn't leave with Q?

22 A. No.

23 Q. Q was another guy that hung out at the house, right?

24 A. Yes.

25 Q. Guy from New York?

Ariel Otero

87

1 A. Uh-huh. Yes.

2 Q. Friend of Mr. Folks?

3 A. Yes.

4 Q. So you did leave the house and you actually left in one
5 of Mr. Folks' cars, right, the blue Dodge Durango?

6 A. No.

7 Q. Do you remember what car you were in?

8 A. I walked.

9 Q. You didn't get into a car?

10 A. No I did not. Me and Mandy left the house. We went to
11 go grab something to eat and then came back.

12 Q. Okay. How long were you gone?

13 A. 30 minutes. Almost an hour.

14 Q. So you don't know what happened in that house when you
15 were out of it?

16 A. No.

17 MS. SAVNER: Nothing further.

18 THE COURT: Okay. Any redirect?

19 MR. KAPLAN: Just one question, Judge.

20 REDIRECT EXAMINATION

21 BY MR. KAPLAN:

22 Q. Have you heard the street slang word violate?

23 A. Yes.

24 Q. What does that mean?

25 A. Disrespect.

Ariel Otero

88

1 Q. And did you consider Brian a friend?

2 A. Yes.

3 Q. Did you consider him a friend back then?

4 A. Yes.

5 Q. Did he force you to do anything you didn't want to do?

6 A. No.

7 MR. KAPLAN: I have nothing further, Your Honor.

8 THE COURT: Okay. Anything further?

9 MS. SAVNER: No, Your Honor.

10 THE COURT: All right. Thank you, Ms. Otero. You're
11 free to go.

12 THE WITNESS: Thank you.

13 THE COURT: Okay. Defense want to call the next
14 witness.

15 MR. KAPLAN: Your Honor, I would call Brittany Barber
16 to the stand.

17 DEPUTY CLERK: Please come forward, Miss Barber, to
18 be sworn.

19 BRITTANY BARBER,

20 Having been duly sworn, testified as follows:

21 DEPUTY CLERK: You may take the stand.

22 THE COURT: Good morning, Ms. Barber.

23 THE WITNESS: Good morning.

24 DIRECT EXAMINATION

25 BY MR. KAPLAN:

Brittany Barber

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1 Q. Brittany, would you state your full name please?

2 A. Brittany Marie Barber.

3 Q. And do you live in Jericho?

4 A. Correct.

5 Q. And how long have you lived in Vermont?

6 A. My whole life.

7 Q. Where were you born?

8 A. Burlington.

9 Q. And where did you attend high school?

10 A. Milton.

11 Q. And did you graduate?

12 A. Yes.

13 Q. When did you graduate?

14 A. 2012.

15 Q. Did you ever meet Ayla Lang in high school?

16 A. Correct.

17 Q. So you have known her since then?

18 A. Yes.

19 Q. So at some point were you using drugs?

20 A. Yes.

21 Q. Was it heroin?

22 A. Yes.

23 Q. And at some point were you working as a prostitute?

24 A. Yes.

25 Q. Let me just add you're pregnant now?

Brittany Barber

90

1 A. Correct.

2 Q. And when are you due?

3 A. July 21, 2019.

4 Q. And do you have plans to be married?

5 A. Yes.

6 Q. When are you -- when is that?

7 A. We're getting married next year.

8 Q. So you were working as a prostitute prior to the spring
9 of 2015?

10 A. Correct.

11 Q. And how bad was your heroin addiction? Was it an
12 addiction?

13 A. Yes.

14 Q. And how bad was it?

15 A. It was to the point where I couldn't even get out of bed
16 without it. So it was pretty severe.

17 Q. How long had you been doing that before the spring of
18 2015?

19 A. Probably about two years prior.

20 Q. And did you ever see Ayla while you were doing that?

21 A. Yes.

22 Q. Where would you see her?

23 A. She would be either at the houses that I was at or I
24 would just see her on the street.

25 Q. Would you see her in any hotels?

Brittany Barber

91

1 A. Yes.

2 Q. Which ones? Do you remember?

3 A. Motel 6, the LaQuinta off of Williston Road, and I
4 believe I've seen her one time at the Marriott.

5 Q. And that was before the spring of 2015?

6 A. Correct.

7 Q. And she was there frequently?

8 A. Yes.

9 Q. And were any of those the hotels where you used to meet
10 dates?

11 A. Yes.

12 Q. All of them?

13 A. Not all of them.

14 Q. Okay. Which ones did you go to?

15 A. I would have people -- I would go work out of people's
16 houses as well not just hotels.

17 Q. At some point did you meet Brian Folks?

18 A. Yes.

19 Q. Tell us please how that came about.

20 A. He messaged me on Facebook and I went over to the
21 address he had given me and that's basically how I met him.

22 Q. Do you recall what the message was that he sent to you?

23 A. I believe he said hey what's up. That's how the
24 conversation started.

25 Q. And was there very much conversation before you decided

Brittany Barber

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1 to go over to his house?

2 A. Not really.

3 Q. So tell us what happened, if anything? Was his house on
4 Spring Street? Is that where it was?

5 A. Yes.

6 Q. Or North Union? Do you remember?

7 A. By Pearl Street Beverage.

8 Q. North Union.

9 A. So yeah.

10 Q. So tell us what happened -- excuse me -- if anything,
11 when you went over there?

12 A. I bought drugs and I would use drugs there.

13 Q. And how often did you do that?

14 A. I was only there for two weeks -- going on two weeks.

15 Q. So did you end up living at that house for two weeks?

16 A. A house, yes, but not that one. I did stay at that
17 house for the first two nights I was with him and then I moved
18 to a different house, but he was still with me.

19 Q. Where did you move to?

20 A. I was off of North Avenue.

21 Q. And did Brian make arrangements for you to go there?

22 A. Yes.

23 Q. Who else was there with you?

24 A. I believe her name is Mandy.

25 Q. Okay, and what did you do -- did you have a room at that

Brittany Barber

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1 house where you could stay in?

2 A. Yes.

3 Q. Did you sleep there?

4 A. Yes.

5 Q. And did you see dates there?

6 A. Yes.

7 Q. And did Brian know that you were prostituting?

8 A. Yes.

9 Q. How did he know that?

10 A. I told him.

11 Q. And --

12 A. I offered to work with him to put money in his pocket
13 because he was supplying me with the drugs so I obviously
14 wanted to make a business offer with him.

15 Q. He was giving you the drugs for free?

16 A. No.

17 Q. But he was supplying you. Was it a reasonable price?

18 A. Yes.

19 Q. And so what was the -- what is it that you said to him?
20 What was the business proposal you made?

21 A. I told him what I did which was prostitution. I told
22 him how much I charged an hour and my hourly rate, and I told
23 him I would give him 50/50 as long as he took care of me and I
24 would put money in his pocket and that was the arrangement that
25 we had.

Brittany Barber

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1 Q. And he agreed to that?

2 A. Yes.

3 Q. And why -- and so he let -- he suggested you stay out of
4 Unc's house on North Avenue?

5 A. Yes.

6 Q. And why is it that you only did that for two weeks?

7 A. Because I was trying to get sober. I didn't want to
8 live that lifestyle any more.

9 Q. And did Brian ever stand in your way of trying to get
10 sober?

11 A. No.

12 Q. Did he talk to you about getting sober?

13 A. I would talk to him about it.

14 Q. What would you say?

15 A. I would tell him that I wanted to stop and that I wanted
16 -- obviously wanted to get the health that I needed, and you
17 know he told me he was -- would be my friend and would be there
18 for me if I ever wanted to and -- but eventually I just chose
19 drugs over getting sober at that time.

20 Q. And eventually did you get sober?

21 A. Yes.

22 Q. When did that happen?

23 A. I got sober March 4, 2018.

24 Q. So you remember that date?

25 A. Very well.

Brittany Barber

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1 Q. And while you -- how often did you see Brian during that
2 two-week period?

3 A. Not very. I didn't really do much transaction with him.
4 It was always Mandy.

5 Q. Okay. Who would you give the money to?

6 A. Mandy.

7 Q. Did you ever give the money directly to Brian?

8 A. No.

9 Q. And how did Brian treat you during the period of time
10 that you were with him?

11 A. Respectful.

12 MS. SAVNER: Objection, Your Honor. May we approach?

13 THE COURT: Yes. Okay. I'll turn the husher on.

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Brittany Barber

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1 [Bench conference].

2 MS. SAVNER: Your Honor, she's testified she's a drug
3 customer and that she was prostituting, but she's not
4 testifying about the way he treated the other women. She was
5 testifying about specific acts and about the way he treated
6 her.

7 THE COURT: I thought she made a deal with him
8 through Mandy -- actually with him 50/50. She's going to
9 engage in prostitution. Going to split the proceeds. She
10 becomes just like everybody else I thought. Isn't that --

11 MR. KAPLAN: I mean every Government witness
12 testified how Brian treated them. I don't know why this
13 witness can't do that.

14 THE COURT: Well right, but she is in fact a -- she
15 is in fact an employee or working --

16 MR. KAPLAN: Working for him as a prostitute. They
17 split 50/50.

18 THE COURT: All right
19 [End of bench conference]

20

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25

Brittany Barber

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1 BY MR. KAPLAN:

2 Q. I think you testified that he was respectful toward you?

3 A. Uh-huh.

4 Q. You have to say yes or no.

5 A. Yes.

6 Q. Did you ever see him be abusive to anyone?

7 A. No.

8 Q. Did you see him interact with the other women at all who
9 were working as prostitutes?

10 A. Not really, no.

11 Q. Did you see him interact with Mandy?

12 A. Yes.

13 Q. How was he with her?

14 A. Very respectful. He treated her like a queen.

15 Q. So you said you got clean like a year later?

16 A. Uh-huh.

17 Q. What did you do in the year in between? Did you just
18 continue on doing what you were doing?

19 A. Yes.

20 Q. And then obviously you stopped working as a prostitute?

21 A. Yes.

22 Q. At the same time you got clean?

23 A. Yes.

24 Q. Do you know if you're having a boy or a girl?

25 A. I'm having a boy.

Brittany Barber

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1 MR. KAPLAN: I have nothing further, Your Honor.

2 THE COURT: Okay. All right. Any cross examination?

3 MS. SAVNER: Yes, Your Honor. Just one moment.

4 THE COURT: Yes.

5 CROSS EXAMINATION

6 BY MS. SAVNER:

7 Q. Good morning, Miss Barber.

8 A. Good morning.

9 Q. We haven't met before, have we?

10 A. Uh-uh.

11 Q. Okay. I'm just going to ask you a few questions. You
12 testified that you met Brian Folks on Backpage -- or, excuse
13 me, on Facebook; is that right?

14 A. Yes.

15 Q. Okay. So you hadn't met him in person before?

16 A. No.

17 Q. He must have seen your profile, your picture, on
18 Facebook and decided to approach you?

19 A. I believe so.

20 Q. Do you know why?

21 A. No. I'm just assuming that it had to do with the type
22 of work I did.

23 Q. Okay. He knew you worked as a prostitute?

24 A. Probably yes.

25 Q. So he contacted you, asked you to come over that very

Brittany Barber

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1 same day?

2 A. Yes.

3 Q. Yes?

4 A. Yes.

5 Q. And did you go over?

6 A. Yes.

7 Q. You bought drugs from him there?

8 A. Yes.

9 Q. And this was at the house on North Union Street; is that
10 right?

11 A. Correct.

12 Q. Okay. You bought drugs from him or Mandy at that house?

13 A. Yes.

14 Q. You understood them to be his drugs, right?

15 A. Right.

16 Q. Okay. Did he take pictures of you there?

17 A. No.

18 Q. Did he take pictures of you later?

19 A. Not that I recall.

20 Q. Okay. Well pictures of you were taken at Unc's house,
21 right, on North Avenue?

22 A. Yes. Pictures, yes.

23 MS. SAVNER: May I approach?

24 THE COURT: Yes.

25 BY MS. SAVNER:

Brittany Barber

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1 Q. I'm approaching you with what we will mark as
2 Government's 141. Can you take a look at these? Are these
3 pictures of you --

4 A. Yes.

5 Q. -- as best you can tell?

6 A. Yes.

7 Q. Okay, and the pictures we're looking at on page 1, 2, 3,
8 4, these pictures were taken at Uncle Marty's house on North
9 Avenue, right?

10 A. Yes. Correct.

11 Q. Were these for Backpage?

12 A. Yes.

13 Q. Did you know that the defendant kept a folder with your
14 name on it in his computer --

15 A. No.

16 Q. -- full of these pictures of you?

17 A. No.

18 Q. So you were Backpaging at the time you started hanging
19 out with the defendant, right?

20 A. Yeah.

21 Q. And you were doing drugs?

22 A. Yes.

23 Q. And you were buying your drugs from him, right?

24 A. Correct.

25 Q. You saw him with a large quantity of drugs?

Brittany Barber

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1 A. Not large quantity, but with drugs on hand, yes.

2 Q. He was a steady supplier for you?

3 A. Yes.

4 Q. And he was in charge of what was going on at Unc's
5 house, right?

6 A. Yes.

7 Q. You talked about a deal you worked out with him when you
8 started kind of joining forces with him and you were
9 prostituting for him, right?

10 A. Not really so much for him. It was mainly for my
11 addiction. That -- I mean so to speak. So it was mainly for
12 myself because I did it. I'm the one that brought it up to
13 him. So it was all on me.

14 Q. Okay. So you needed drugs to support your addiction?

15 A. Correct.

16 Q. You described yourself as having a severe heroin
17 addiction?

18 A. Correct.

19 Q. Okay. Describe what it feels like to be sick -- dope
20 sick?

21 A. You're sweaty, you get cramps in your abdomen, it feels
22 like your back is breaking, you puke, you're constantly going
23 to the bathroom. It's just a ridiculous cycle.

24 Q. Do whatever you could to avoid those symptoms, right?

25 A. Yes.

Brittany Barber

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1 Q. You would prostitute --

2 A. Yes.

3 Q. -- as you described? And Brian Folks was the one that
4 gave you the heroin you needed to get well, right?

5 A. Correct.

6 Q. Okay, and you split your profits with him 50/50?

7 A. Correct.

8 Q. What did you do with your 50 percent?

9 A. Normally it would all go to him because I would
10 obviously hold on to my 50, but I would end up buying more
11 drugs with it at the end of the night so he ended up getting
12 all my profit.

13 Q. And you talked to him about your desire to get sober,
14 right?

15 A. Uh-huh.

16 Q. Is that a yes?

17 A. Yes.

18 Q. Okay. He was your drug dealer at the time, no?

19 A. Yes.

20 Q. And getting sober didn't work out, right?

21 A. No.

22 Q. Not at that time?

23 A. Not at all.

24 Q. Despite the fact that he seemed supportive?

25 A. Correct.

Brittany Barber

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1 MS. SAVNER: Nothing further.

2 THE COURT: Okay. Anything further?

3 MR. KAPLAN: Just one question.

4 REDIRECT EXAMINATION

5 BY MR. KAPLAN:

6 Q. Brittany, do you know if Ayla was a heavy drug user
7 before the spring of 2015?

8 A. Yes.

9 Q. And how do you know that?

10 A. I was using with her in a hotel room. I was staying at
11 Motel 6 and she stayed with me one time and she was getting
12 high with me.

13 Q. Would you see her with guys in that room?

14 MS. SAVNER: Objection, Your Honor.

15 THE COURT: This is beyond the scope of cross
16 examination.

17 MR. KAPLAN: Actually it isn't, Judge. Well okay. I
18 have nothing further.

19 THE COURT: All right. Anything further from the
20 Government?

21 MS. SAVNER: No, Your Honor.

22 THE COURT: All right. Thank you, Ms. Otero.

23 THE WITNESS: Thank you.

24 THE COURT: All right. Defense want to call the next
25 witness.

Emily Lasell

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1 MR. KAPLAN: Your Honor, the defense would call Emily
2 Lasell.

3 DEPUTY CLERK: Please come forward to be sworn.
4 Emily Lasell,

5 Having been duly sworn, testified as follows:

6 THE COURT: Good morning, Miss Lasell.

7 THE WITNESS: Good morning.

8 DIRECT EXAMINATION

9 BY MR. KAPLAN:

10 Q. Is it okay if I call you Emily?

11 A. Yes.

12 Q. I'm not sure you're going to need this microphone, but
13 I'm going to make sure it's in front of you. Okay. Would you
14 state your full name please?

15 A. Emily Rose Lasell.

16 Q. And what town do you live in?

17 A. Colchester, Vermont.

18 Q. And what is your educational background?

19 A. Some college. Not a whole lot.

20 Q. You graduated from high school?

21 A. Yes.

22 Q. What high school?

23 A. Milton.

24 Q. Did you know Ayla in high school?

25 A. Towards the end of high school.

Emily Lasell

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- 1 Q. And you saw her on occasion after high school?
- 2 A. Yes.
- 3 Q. In fact, you spent some time with her?
- 4 A. Yes.
- 5 Q. Tell the jury -- you have a criminal record?
- 6 A. Yes I do.
- 7 Q. It's a federal conviction?
- 8 A. Yes it is.
- 9 Q. And what was that for?
- 10 A. Conspiracy with intent to distribute.
- 11 Q. Okay and did you do some time on that?
- 12 A. I did.
- 13 Q. How long did you do?
- 14 A. 18 months.
- 15 Q. Glad to be home?
- 16 A. Absolutely. A hundred times better than I have ever
- 17 been in my entire life.
- 18 Q. So right now you're sober?
- 19 A. Absolutely.
- 20 Q. Clean?
- 21 A. It feels great.
- 22 Q. You can remember the difference?
- 23 A. The difference from when I was using to now?
- 24 Q. Right.
- 25 A. I don't remember a whole lot of my using days.

Emily Lasell

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1 Q. So you were using -- was it heroin?

2 A. Yes.

3 Q. Was it after high school?

4 A. Yes.

5 Q. And did you have an addiction?

6 A. Yeah.

7 Q. How serious was it?

8 A. Serious enough to put me in holding for 18 months and
9 send me to six different rehabs.

10 Q. And eventually it was successful?

11 A. Yes. You got to want it. It's not something that just
12 comes to you. You have to want it.

13 Q. Did you make decisions to go to rehab over and over
14 again and just didn't take for a while?

15 A. At first I would want to go and then after a couple days
16 I would leave and that obviously doesn't work. I went to
17 Valley Vista I think it was three times and every time I would
18 leave.

19 Q. What did you think of the Valley Vista program?

20 A. I think it's a good program from what I saw. I wasn't
21 there for very long any of the times, but the program seemed to
22 have worked for the other girls that were there so --

23 Q. And did you feel like at the time that you were addicted
24 that you had a choice whether to keep using or to stop using?

25 A. No.

Emily Lasell

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1 Q. That's because the addiction was so bad?

2 A. Yes.

3 Q. And were you working as a prostitute then?

4 A. I was kind of. I was kind of doing my own thing. I was
5 working for Solid Gold.

6 Q. The dancing group?

7 A. Yes.

8 Q. But were you actually taking money for sex?

9 A. For sexual acts, but not sex specifically.

10 Q. And this was before the spring of 2015?

11 A. I went to jail May 2015.

12 Q. Okay, and was Ayla doing sex acts for money prior to the
13 spring of 2015?

14 A. I have reason to believe that she might have been, but I
15 never physically saw it myself. I never saw any exchange. I
16 never saw her with no clothes on, et cetera.

17 Q. Do you recall that you met with Jennifer Martin, an
18 investigator for the defense, on April 29th of 2019?

19 A. You mean when she came to my work?

20 Q. Served you with a subpoena?

21 A. Yes.

22 Q. And do you recall she said to you that Ayla is saying
23 that she didn't prostitute --

24 MR. GRADY: Objection, Your Honor. Hearsay.

25 THE COURT: Okay. Would counsel approach the bench?

Emily Lasell

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1 I'll put the husher on.

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Emily Lasell

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1 [Bench conference]

2 THE COURT: Is this to impeach?

3 MR. KAPLAN: What happened was the investigator goes
4 out there and says Ayla is saying she never prostituted when
5 she met Brian. This woman said that's bullshit, and Jennifer
6 said -- who I'm going to put on next -- how do you know that.
7 Because I used to do it with her. So it's impeachment. Setup
8 so I can put Jennifer Martin on the stand.

9 MR. GRADY: This can't be admitted for the truth of
10 the matter asserted.

11 THE COURT: It's being offered to impeach.

12 MR. GRADY: They can't argue --

13 THE COURT: They can't argue it as the fact.

14 MR. GRADY: Right.

15 THE COURT: So it's admitted for purposes of
16 impeachment. Okay.

17 [End of bench conference]

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Emily Lasell

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1 BY MR. KAPLAN:

2 Q. So I'll repeat my question. Do you recall meeting with
3 Jennifer Martin I think you said?

4 A. Yup.

5 Q. And do you recall her saying to you that Ayla is saying
6 that she did not engage in prostitution before she met Brian?

7 A. I do recall her saying that.

8 Q. And do you recall that you said that's bullshit?

9 A. Yes I did.

10 Q. And do you recall Jennifer saying to you how do you know
11 that and you said because I used do it with her?

12 A. I may have misinterpreted what she was asking me or just
13 not necessarily done it with her -- no with her.

14 Q. But you knew she was doing it?

15 A. But I knew she was doing it.

16 Q. Okay.

17 A. But I don't really have any solid -- you know what I
18 mean. I know you want solid stuff. I don't really have that.

19 Q. But you knew her in high school?

20 A. Yup.

21 Q. You saw her frequently after high school? Yes?

22 A. Yes.

23 Q. You would see her around?

24 A. Yes.

25 Q. And you knew what she was up to?

Emily Lasell

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1 A. Yes. She was an addict. She was getting what she
2 needed for herself.

3 Q. And who would understand that better than yourself,
4 right?

5 A. Nobody, well, unless you have been there.

6 Q. Right, and where did you do your time on the federal
7 level?

8 A. I did some here in Burlington. Not very much. I did a
9 whole bunch at Cheshire County, New Hampshire.

10 Q. So you didn't do the five hundred hour drug program?

11 A. I'm sorry.

12 Q. How did you stop using?

13 A. Maine General. It's a rehab program; nine-month
14 program.

15 Q. Is that after you got out?

16 A. Yes.

17 MR. KAPLAN: All right. I have nothing further,
18 Judge.

19 THE COURT: Okay. Cross examination, Mr. Grady.

20 MR. GRADY: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. GRADY:

23 Q. Good morning, ma'am.

24 A. Good morning.

25 Q. As I understand it, it was July 17, 2017 when you

Emily Lasell

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1 pleaded guilty to conspiracy to distribute?

2 A. It could very well be. I don't remember the day, sir.

3 Q. Sure. No problem, but that was here in federal court?

4 A. Yes.

5 Q. And you previously mentioned you served 18 months in
6 prison?

7 A. Yes.

8 Q. And you received three years of supervised release?

9 A. Yes.

10 Q. Are you still on supervised release?

11 A. No.

12 Q. That part is done?

13 A. Yes.

14 Q. I'm going to direct your attention to May 1st of 2015.

15 I don't know if you recall May 1st offhand. Do you recall -- I
16 would say that's no?

17 A. No.

18 Q. Just making it clear for the court reporter. Do you
19 recall meeting at Manhattan Pizza?

20 A. No.

21 Q. Do you remember being at Manhattan Pizza with Ayla?

22 A. I'm sure I went there. Oh is this when I OD'd?

23 Q. When you passed out at the Manhattan Pizza's rest room.

24 A. Yes. Yes. I don't recall exactly what happened, but I
25 do know she was there with me.

Emily Lasell

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1 Q. Ayla was there and also Eric Ballard was there as well?

2 A. I don't even know who that is.

3 Q. But you mentioned you passed out and were taken to the
4 hospital?

5 A. Yes.

6 Q. And do you recall telling Officer Kalig of the
7 Burlington Police Department that Ayla stole your wallet?

8 A. Yes.

9 Q. Did you in fact believe that Ayla stole your wallet?

10 A. I know she did.

11 Q. And you also said she took your sunglasses?

12 A. My sunglasses, my wallet, and all the drugs out of my
13 wallet. So when I got my wallet back it had no money or drugs
14 in it.

15 Q. Fair to say you were a little upset with Ayla?

16 A. Oh boy I was upset all right. Yes. Like you just
17 watched your friend die and now you want to take off everything
18 I had.

19 Q. And to make sure I understand your testimony you never
20 saw Ayla actually engaging in sex with a client. Is that what
21 you're saying under oath?

22 A. Correct.

23 Q. And you mentioned that she had a heroin addiction,
24 right?

25 A. Yes.

Emily Lasell

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1 Q. And I believe you mentioned that you went to jail in May
2 of 2015, right?

3 A. Yes.

4 Q. Never saw Ayla after May of 2015 then?

5 A. I haven't seen her since.

6 MR. GRADY: No further questions, Your Honor.

7 THE COURT: Okay. Any redirect?

8 MR. KAPLAN: No, Your Honor. Thank you.

9 THE COURT: All right. Thank you. Okay. Let's take
10 our break. I'm going to stay and talk with the lawyers. We'll
11 be back at 1:15.

12 [Jury leaves at 12 p.m. The following occurred in open court
13 without the jury present]

14 THE COURT: Okay. So from the defense do you have
15 additional witnesses this afternoon?

16 MR. KAPLAN: We do, Judge. I will probably call
17 Jennifer Martin. We have our expert. Maybe Chrissy and who
18 knows.

19 THE COURT: And who knows?

20 MR. KAPLAN: Who knows.

21 THE COURT: Okay. So you're calling your
22 investigator. You call your expert witness and you may be
23 calling one additional witness. Is that Chrissy?

24 MR. KAPLAN: Possible, yes. That's possible.

25 THE COURT: Okay.

1 MR. KAPLAN: Not everyone has shown up either so --

2 THE COURT: Pardon me.

3 MR. KAPLAN: Not everyone has come that said they
4 would either so --

5 THE COURT: Okay. All right, and does the Government
6 anticipate -- well Government anticipate rebuttal?

7 MR. DARROW: We need to talk about that depending on
8 how the defense case comes in. Probably not, but we would
9 appreciate hearing from the defense what witnesses they are
10 calling. It's pretty late in the day. We rested. They should
11 know and in the past the Government has given them notice at
12 least a day before. Actually we pretty much told them all our
13 witnesses.

14 THE COURT: Let me see if I can interpret Mr.
15 Kaplan's comments. He probably subpoenaed a number of
16 witnesses and you have that list -- witness list. So
17 scratching the three there may be some other witnesses whom --
18 who received subpoenas and did not show. That's a possibility.
19 Then there's Chrissy and obviously the investigator and the
20 expert and that's it.

21 MR. KAPLAN: Judge, I would like to be clear about
22 this because this is the second time Mr. Darrow has said this.
23 Sunday we sent him an e-mail and we pared our witness list down
24 to like six or seven people. Then Monday after court I pared
25 it down more to like four or five people. So I think he's got

1 a pretty good idea, and then I told him this morning who we're
2 calling and in what order pretty much. So I feel like I've --
3 believe me we appreciate the Government telling us who they are
4 calling the next day because otherwise it would be -- and I
5 tried to do the same. Now if I messed up I apologize, but I'm
6 pretty sure that we have been pretty conscientious.

7 THE COURT: Right and I think Mr. Darrow's taking
8 your comments about whoever else shows up. Right.

9 MR. DARROW: Exactly. The defense witness list has
10 been an evolving and changing thing. We have new names. All
11 we're saying at this late point we think it's fair the
12 defendant tell us who his witnesses are.

13 THE COURT: Oh I think that's true and in fact it
14 says that he has done that.

15 MR. KAPLAN: I'm not calling anyone, Judge, that I
16 haven't told him about either Sunday or Monday.

17 THE COURT: Okay.

18 MR. KAPLAN: Probably not anyone that I haven't told
19 him about yesterday.

20 THE COURT: Well so you have already called three of
21 the witnesses. If you gave him notice of five, at least you
22 got two left. There must be just a couple of others whom you
23 subpoenaed and they may not have shown.

24 MR. KAPLAN: That's right.

25 MR. DARROW: So the one exception between Your

1 Honor's description of the defense list and Mr. Kaplan's is
2 that no mention of the defendant. Is he going to testify?

3 MR. KAPLAN: Well, Judge, this is another
4 conversation I had with the prosecutor and probably five times
5 that I have said I never ever disclose if I intend to call my
6 client, but if I were you, I would be ready for it just in case
7 I do, and Mr. Darrow acknowledged that I said that and I don't
8 make that decision until the very last minute and everybody
9 knows that. Mr. Darrow knows that. The whole office knows
10 that. Van de Graaf is still angry about it from a previous
11 trial. That's where we are.

12 THE COURT: Does he talk to you?

13 MR. KAPLAN: He came up to me and said are you going
14 to call your client. I said I would have to be crazy to do
15 that and I ended up doing it because that's the way it worked
16 out.

17 THE COURT: Okay. Obviously it's a whole lot
18 different when you're talking about the testimony of the
19 defendant. What I'm concerned about is you being noticed of
20 the various witnesses that they are likely to call, and
21 obviously a decision as to whether a defendant testifies is in
22 many ways made between the defendant and the defense counsel
23 and it's made at the end. So I'm not -- I don't think it's
24 problematic that he's not disclosing that at this particular
25 point, although he has disclosed that you should be prepared,

1 but as practical matter the witnesses whom the defense intends
2 to call are obviously the investigator, the expert witness,
3 perhaps -- this is Chrissy T?

4 MR. KAPLAN: Yes, Judge. We wanted to play a tape
5 recording.

6 THE COURT: All right. So you identified that to the
7 Government?

8 MR. KAPLAN: Yes.

9 THE COURT: And there's others.

10 MR. KAPLAN: I think they almost said they would play
11 it for me.

12 MR. DARROW: We oppose the playing of the tape
13 recorder in court, but we -- at counsel's request we asked
14 Chrissy T. to be here at one o'clock in case he wanted to call
15 her.

16 THE COURT: Okay and is there -- there's no one else
17 that you know of?

18 MR. KAPLAN: No, Judge.

19 THE COURT: Okay. Then all right. I think I
20 understand. So I'm going to go see how the research is going
21 on Count XV. Okay.

22 [Recess at 12:05 p.m.]

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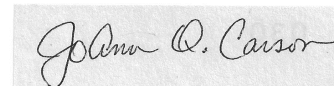
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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.



May 7, 2019

Date

JoAnn Q. Carson, RMR, CRR